THE
MODERN LAW REVIEW

EDITORIAL BOARD

Rt. Hon. E. Leslie Burgin, LL.D., M.P.
John G. Foster, Esq., M.A.
Professor Morris Ginsberg, M.A., D.Litt.
Professor A. L. Goodhart, LL.D., D.C.L.
Professor H. C. Gutteridge, LL.D., K.C.
R. O'Sullivan, Esq., K.C.
Professor Sidney Post Simpson, A.B., LL.B.

EDITORIAL COMMITTEE

R. S. T. Chorley, M.A., *General Editor.*
W. Friedmann, LL.M., Dr.Jur.
L. C. B. Gower, LL.M.
W. I. Jennings, M.A., LL.B., LL.D.
O. Kahn-Freund, LL.M., Dr.Jur.
G. W. Keeton, M.A., LL.D.
J. Unger, LL.M.

Vol. VIII MARCH, 1945 Nos. 1 and 2

THE UNPAID MAGISTRATE AND HIS FUTURE

THE long-awaited Report of the Departmental Committee on Justices' Clerks[1] makes substantial, if not very radical, proposals for reforms in connection with the Magistrates' Courts. It is therefore a suitable time to consider the whole problem of these Courts, in so far at any rate as they are staffed by unpaid, lay justices.

It would be beside the point to describe in detail the long historical process by which the present system has gradually been built up. Its origins have now been pushed back to the twelfth century, and by the end of the Middle Ages the justice of the peace had become an essential and important wheel in the machinery of justice. Before the rebuilding of local government institutions in the nineteenth century the justices controlled the machinery of local government, as well as the petty criminal administration. The central government was far away and the justices lorded it in the provinces. Envied, hated, and feared throughout the eighteenth and early nineteenth centuries by large sections of the community, they acted as the bulwark of the dominant landowning class, and acquired a prestige which still in large measure persists, and is marked by the high value attached both socially and politically to the office among local notabilities.[2]

Although in local government they retain but vestiges of their former power in their participation in the Standing Joint Committee with the County Council, which is the modern police authority in

[1] Cmd. 6507/44: referred to hereafter as Report. The Committee was presided over by Lord Roche, who besides having been a distinguished Lord of Appeal, has had experience as a county magistrate, and had as its Secretary during the later part of its work Dr. R. M. Jackson, an occasional contributor to this Review, and author of *The Machinery of Justice in England.*

[2] This "social distinction" was commented on by the Royal Commission on the Selection of Justices of the Peace in 1910. Cmd. 5358.

counties, their importance in the administration of justice has steadily increased since the middle years of the last century. Even here, however, one side of their work, the police side, has practically disappeared. Originally appointed primarily to keep the peace, as their ancient title *conservatores pacis* signifies, they became less and less competent to do this work efficiently as society became less rural, and with the growth of the modern police system their functions in this respect became otiose. Here and there a country justice may still intermeddle with police matters, but by and large "the justices of the peace have become primarily judges,"[3] a change which the Committee regard as "fundamental."

The volume of work carried through in the Magistrates' Courts has swollen as a result partly of the creation of large numbers of new offences and some new civil duties, as in connection with the adoption of children, and partly by the establishment of their optional jurisdiction over indictable offences—the option, of course, being that of the accused, not that of the magistrate. The latter process was instituted in 1847 (the middle years of the last century were a remarkably fertile period not only in the history of the substantive criminal law, but for innovations in procedure also; the succeeding generations have made nothing like the same contribution to progress). It has been continually developed, and must be regarded as of fundamental importance. For example, in the case of children it has resulted in the justices obtaining full jurisdiction, except in cases of homicide.[4] This jurisdiction dates from the Criminal Justice Act, 1855, in the case of adults. In 1879 the number of persons tried summarily for indictable offences was 38,690; by 1938 this figure had risen to 75,402,[5] a substantial proportion of whom were, however, juveniles. During the same period the number of persons sent for trial on indictment fell from 16,303 to 10,003,[6] a decrease largely due to continual extensions of the jurisdiction of the justices.[7]

The total number of charges coming before the Magistrates' Courts has not increased in the same proportion, but the numbers given, 661,653 in 1893 to 820,181 in 1938, would be disturbing if it did not appear that more than half the latter total was made up of charges under the Traffic Acts, while the decrease in the charges for drunkenness from 210,024 in 1907 to 53,402 in 1938 can be regarded as evidence of a social revolution.[8]

I have given the above extracts from the figures published in the Report for the purpose of emphasizing the great volume of the criminal

[3] Report, p. 5.
[4] Children and Young Persons Act, 1933, s. 60, Sched. III.
[5] Report, p. 6.
[6] *Ibid.*, 6.
[7] Stone's *Justices' Manual* lists eighteen different classes of case. In offences relating to property the value of the property concerned has been steadily raised, while the punishment which the Court may inflict has become correspondingly more severe, amounting now to a maximum sentence of six months' imprisonment, or a fine of £100, or both.
[8] On this paragraph see the Report, paras. 10–12.

work which is entrusted to the magistrates. But it is obvious to any observant person that the life of the community is very much intermingled with, and influenced by, their work. There can, indeed, be but few adults, at any rate among those who drive motor vehicles, who have not had personal experience of these courts. Moreover, their only less important civil jurisdiction over such matters as husband and wife, bastardy, small tenancies, enforcement of rates, and employers and workpeople (the last-named of less practical importance in modern times) touches a very large number of the proletariat on an intimate side of life, and may have lasting effects on their well-being.

A large proportion of this work is, of course, done by paid professionals: the metropolitan magistrates in London, and the similarly qualified stipendiaries in the largest provincial cities. The majority of County Boroughs, however, have never taken steps to secure the appointment of stipendiaries; this is so in some cities such as Newcastle, Nottingham, Bristol, and Leicester. Here and in all other centres of population the unpaid justices are entirely responsible for the work of the Magistrates' Courts, and even in London and the larger cities they have not been completely ousted by any means. In the result, therefore, a very large mass of fundamentally important social work is entrusted by the community to amateurs.[9]

This is at first sight an extraordinary state of affairs: although it is explicable on historical grounds it is not thereby justified. The lay magistrate indeed affords such an obvious target for the social satirist, and indeed for the enthusiastic reformer, that from the time of Shakespeare with his cruel portrait of Robert Shallow "member of the quorum," to our own days, when popular papers such as *Truth* and *John Bull* have specialised in holding up to public ridicule and contempt the worst cases of abuse, he has been continuously in the limelight, and an unkindly limelight at that.

Most of the obloquy in which the lay magistrates are held is quite undeserved. It represents a hang-over from older times when justices quite naturally and openly regarded themselves as a bulwark to protect the interests of the governing class. They then used their police, administrative, and judicial powers ruthlessly and often unfairly, and thereby earned a hatred and contempt which their successors are taking a long time to live down.

There has certainly of recent years been a perceptible diminution in the flood of the attack, and it might appear to a cursory observer that the system has acquired a certain popularity. Indeed, Dr. Hanbury in his recent book on the English Courts gives a highly eulogistic account of the unpaid magistrates, and takes the view that criticism is practically non-existent, going so far as to say that only "on rare occasions . . . an individual justice will arouse public criticism."[10] The opposite point of view has been well put in the book *English*

[9] According to Mr Page in *Justice of the Peace* (p. 25), there are about a thousand Courts being worked by lay justices.

[10] *English Courts of Law*, p. 147. See my review of this book, *infra*, p. 85.

Justice, by "Solicitor,"[11] and is supported by a number of incidents involving in a few cases harsh conduct, and in many others unjudicial methods, vouched for by the author as being within his own personal experience. "Solicitor" has obviously had much practice in Magistrates' Courts, and while on careful reading his indictment is perhaps less serious than would at first sight appear, the picture which he paints is nevertheless a disturbing one.[12]

In his Preface "Solicitor" gives it as his opinion "that the working classes as a whole have not shared in the positive belief in English justice" which is common among other classes. Other experienced practitioners have expressed similar views to me, and I believe this scepticism to be more prevalent in regard to the unpaid Magistrates' Courts than to any others. I recently had the opportunity of testing the soundness of this view among war-time discussion groups held among firemen and civil defence workers in the North-west of England. On a number of occasions when opening discussions at such groups, I took the subject of the lay element in the administration of justice. I found that the suspicion and dislike of the lay magistrate was widespread, indeed almost unanimous, for only once did I hear the view expressed that the present system should be retained. The opinion was to all intents universal in favour of replacing the unpaid by the professional magistrate.[13]

However ill-founded this attitude may be, it is certainly a serious matter that it should exist. Confidence in the sensible and impartial administration of justice is, or should be, an essential element in social stability. When it is not present every effort should be made to discover what is at fault and to remedy it.

Perhaps the only effective remedy is that of abolition: to accept the solution of the discussion group members, and substitute paid professionals for the unpaid amateurs.[14] After all, modern society is so much more complex and specialised that a system which had its obvious advantages when the amount of law enforced was small and reasonably well known, at any rate to the educated, when economy was important, and slowness of communication made the employment of professionals well-nigh impossible, may well be considered to have outlived its usefulness.

The proposed remedy is certainly feasible under modern conditions. The general administration of the civil law, except for the more

[11] See second edition *passim*. This book is now obtainable in the Penguin Series.

[12] As distinguished and acute an observer as Lord Roche himself said in his Foreword to *Justice of the Peace*, by Mr. Leo Page, that the prevalent criticisms "have material to justify them." Again, Dr. R. M. Jackson says, "Criticism is too widespread to be ignored," *Machinery of Justice in England*, p. 146.

[13] This suspicion is reflected in the almost completely hostile attitude of the Press, and, as far as one could judge, of the general public, towards the Juvenile Court at Hereford in connection with the incident which was afterwards investigated by Goddard, L.J. See the daily Press, 15th October, 1943. It was disturbing to note how the papers and the public at once prejudged the case against the bench in question.

[14] A proposal of this type was discussed at the Law Society's provincial meeting in 1935.

substantial, and certain difficult types of case, is carried out by some sixty County Court judges. The existing number of petty sessional divisions would certainly entail the appointment of a much larger number of stipendiaries than this. The Roche Committee, however, advocate a complete review of the existing divisions, and there can be no doubt that if this is carried out in a scientific and radical manner, a reduction in existing Courts of anywhere from a half to two-thirds can be secured: the motor-car and motor-omnibus make access to the Courts so much simpler a matter than it was a generation ago. It is necessary, however, that Criminal Courts should sit more frequently than their civil counterparts, and however well-organised the system, a much larger number of stipendiaries than of County Court judges would be required. If the reform suggested is really necessary, however, it cannot be maintained that the comparatively small cost involved, costing well under half a million per annum, should be allowed to stand in the way.

I am not, however, satisfied that a stipendiary magistrate provides an ideal Court. While I have no doubt that Court for Court the stipendiary's is a better Court than that of the unpaid magistrate, I have not found in my own experience, admittedly not a wide one, that the difference is more than small, and I think that the good lay Court where it exists is a more satisfactory tribunal than that provided by the best stipendiary.[15]

The greatest weakness of the present-day English judicial system, in my view, is that except in Courts of Appeal, it relies too much upon decisions by single judges. The judicial process is carried through by a chain of reasoning, in the great majority of cases impromptu, and usually by elderly men who are often tired, may be afflicted by sleepiness, or indeed by oncoming illness. A momentary lack of concentration or inattentiveness may vitiate the whole process. The unpaid Magistrates' Court with its rota of several justices is not subject to this defect. It is true, of course, that the great bulk of small criminal work does not provide cases where the decision can be open to doubt, but it is just the doubtful case when it goes wrong which rankles with the victim, and brings into existence a social sore. The late Mr. Abinger, K.C., who had a very wide experience of small court work, expressed the opinion that the Courts had gone wrong in about a third of the cases with which he had been concerned.[16] This may be putting the error too high, but there can be no doubt that it is substantial, and in my view the chief factor in this is the single judge. Two heads are better than one is a rule almost universally accepted on the Continent.[17]

[15] At this point I should explain that I am myself an unpaid magistrate, and my opinions may therefore be considered biased. I held them, however, before appointment to the bench.

[16] *English Justice*, second edition, p. 35.

[17] See R. C. K. Ensor, *Courts and Judges in France, Germany, and England* The English system no doubt has its origin in trial by jury. Trial by judge alone has only become common, in the common law Courts, since the desuetude of the jury began. In cases where there was no jury the judges sat *in banc*.

The best stipendiaries are not necessarily those who have had the best practices. Work in the Temple may be very narrowing, and the good professional magistrate is often a man who had so many outside interests that his practice suffered. A man who has had a wide experience of life, whether in the management of property, of a business, or of a trade union, has a good basis on which to build efficiency as a magistrate. "Many lay justices have the advantage that they have a closer acquaintance with the problems of the people whom they judge than have the professional bench."[18]

It may be interposed that the method of selecting professional magistrates is far from ideal. These positions are in the gift of the Home Secretary who has to rely upon personal recommendations. It is obviously unsatisfactory that the police department should appoint magistrates, as well as illogical that one Minister should appoint paid, and another unpaid, magistrates.

Common-sense, and a spirit of fairness, are much more important qualities for a criminal judge than technical legal knowledge.[19] Common-sense often leads a lay magistrate to do justice not in accordance with law, while a professional magistrate or judge will apply a technical rule though he knows he is thereby acquitting a guilty man. The lawyer is apt to be shocked at cases when convictions occur though some technical requirement has not been complied with; laymen are less squeamish.[20] I remember defending a publican charged with selling drink out of hours before a lay bench. The prosecution had not a strong case, especially after cross-examination of the police evidence, but the bench found the man guilty without retiring. I discussed the case with one of the magistrates afterwards. He agreed that the police had not had a strong case, but added: "But then, haven't I seen customers coming out of that place after hours for years past?" The defendant was in fact guilty, and was morally properly punished, though a stipendiary would probably have acquitted him.

It would, however, be idle to pretend that the present system of unpaid Magistrates' Courts is a satisfactory one, and the necessary public approval for it will only be secured if a pretty drastic series of reforms are carried out. Reform has, of course, been going on rather slowly and not very drastically for some time past in connection with such matters as trial of juveniles, appointment of magistrates, retirement of magistrates, hearing of appeals by Quarter Sessions, and now, it is to be hoped, in connection with magistrates' clerks; the whole amounting to a fairly respectable total. It is by such methods that we

[18] Claud Mullins, *Crime and Psychology*, p. 206.

[19] Mr. Mullins in the work quoted at p. 206 says: "Common-sense is an essential virtue in those who deal in any way with delinquents. . . . A training in common-sense is given . . . in non-legal walks of life from which the lay justices come; work in trade unions for instance soon separates those possessed of common-sense from those who lack it." But lay magistrates do not always display common-sense; *cf.* the case mentioned by Dr. R. M. Jackson when a bench made an order against an unemployed man to pay 15s. maintenance to his wife, even after the wife had obtained independent employment, *loc. cit.* p. 149.

[20] Several of the cases described in *English Justice* are of this type, and must weaken the force of the argument with the general reader.

in England refashion our ancient institutions, and retain them in some sort of working order. It would very often pay much better to try something new, but the method employed seems to suit the national genius.[21] It must be admitted also that owing to the large numbers of politically influential people who have been appointed to the bench, and who attach importance to the position, the opposition to any proposal for a reform which involved the abolition of the unpaid magistrate would be altogether too strong to allow of its having a chance of success.

I propose therefore to examine some of the main criticisms which are levelled against the unpaid magistrates, and to discuss ways and means of effecting improvements.

The criticism most commonly met with in connection with the lay magistracy is that its members are appointed for political considerations and without due regard for their fitness for the work. This view, which is widely held, has some foundation in fact, but the extreme way in which it is often stated is largely a hang-over from the nineteenth century, the classic period of party politics, when appointments were made by the Lord Chancellor, largely on the recommendation of local Members of Parliament. This method was pushed to something like its limit under Lord Halsbury, who was a great believer in the spoils system, and largely as a consequence of the ensuing volume of public protest a Royal Commission was appointed under his successor, Lord Loreburn, which heard a good deal of evidence and issued a Report in 1910[22] which contained a number of recommendations.

The Royal Commission agreed with much of the public criticism, and stated very frankly that the position of justice of the peace was sought after too frequently merely as a rung in the ladder of social advancement, and as a reward for political services. It recommended that in future the Lord Chancellor in making appointments should be guided by the advice of the Lord-Lieutenant of the county, who should in turn have the assistance of an Advisory Committee of justices drawn from all over the county.

This recommendation was accepted by the Government of the day, and over the last thirty years appointments have been made on responsible advice of this kind. The Lord Chancellor is, of course, still free to make appointments at his own discretion, but it is believed that in practice he seldom, if ever, does so.

The new system is not generally regarded as much better.[23] It is

[21] The Home Secretary, Mr. Herbert Morrison, in a recent address to the Magistrates' Association, said: "The system was designed for a very different state of affairs from that which obtains to-day, and the large measure of success which the Magistrates' Courts have achieved in adapting themselves to present-day conditions is due to the common-sense and ingenuity of the people who have to work a system which is in certain respects out of date." *The Magistrate, Supplement*, November, 1944.

[22] Cmd. 5358/1910.

[23] Both Mr. Mullins and Mr. Leo Page in the works cited express the opinion that it has led to but little improvement, and the general impression among the Discussion Group members was that political considerations are still dominant in connection with appointments.

not easy to judge whether this view is justified, since most of those who express it can have had but little experience of the working of the old system. It rather reflects discontent with the present methods.

The main line of criticism is still that appointments are largely political. It is true that the local party machines make recommendations to the Lord-Lieutenant which are considered by the Advisory Committees, and which are very often accepted. It is not true to say that appointments are predominantly political, and it may be doubted whether they have formed the majority. The Advisory Committees which are composed in such a way as to reflect the most competent among the magistrates in the counties, do their work carefully and conscientiously, and it may be doubted whether there are many cases where they accept the nominations of the local party caucus without satisfying themselves that the candidates are satisfactory on general grounds. Nevertheless it must be admitted that the party nominations are frequently given in reward for past services, and the men and women selected are often too old and worn out to make efficient magistrates.

Quite apart from political cases, however, the reward for service method, which is naturally largely followed, leads to the appointment of elderly magistrates, some of whom continue to sit long after they have ceased to be really competent. This had become so much a matter of criticism that within the last few years a sensible, and as some might say typically English, device has been invented to get over the difficulty. This is the *Supplemental List*, which is in effect a list of magistrates who are no longer fit for Court work, but who can still issue warrants, sign documents, and do the work of a like type.[24] A magistrate who feels that his powers are failing may apply for transfer to this list. Others will be placed on the list by the Lord Chancellor without their consent. The local Advisory Committee may do, and does, useful work here, and over the last few years a substantial number of magistrates of over seventy years of age have been retired in this way, though many over that age are still doing useful judicial work.

Political appointments are attacked on two main grounds. Firstly, that they result in benches with a political bias. It is only very occasionally, indeed, that political considerations enter into the hearing of a case directly; these are usually assaults, or obstruction of the police in connection with strikes. Indirectly, of course, the position of a judge is not free from the subconscious bias which, for example, makes a property owner more likely to deal harshly with offences against property. It may be that in country districts the shadow of the landowner and of the farmer is still across the land, but generally speaking experience indicates that Labour magistrates are not less severe in cases of theft and damage to property than are the so-called representatives of property; indeed, I have heard them criticised as being more harsh. Generally speaking, there has of course in recent times been a noteworthy tendency to leniency in the sentencing of

[24] See the Justices' (Supplemental List) Act, 1941, and rules made thereunder.

prisoners, and this is at least as obvious among the unpaid magistrates as among professional judges.

Secondly, it is suggested that politicians are of a temperament less suited to hold the scales of justice even than are other kinds of people. This may in some cases be true, though some of the best and most even-handed of the High Court judges have been prominent politicians before appointment to the bench. Practical politics, however, calls for an alertness of intelligence and a knowledge of human nature which are of great value on the bench, and I am inclined to think that as a class politicians are more suited to the work of the unpaid magistracy than most others.

The real problem, however, is to find a better method of selection: few are the constructive suggestions which have come from the critics. The proposal that magistrates should be nominated by trade associations, professional societies, trade unions and other similar bodies is perhaps attractive at first sight. It will not, however, bear analysis as a general method of appointment, and it could hardly be relied upon to provide the best available candidates. It might be useful to give such bodies the same facilities for suggesting names to the Lord-Lieutenant as have the political machines.

It may be doubted, however, whether any better method than that of the Advisory Committee can be devised. Where such committees are well composed and carry out their duties conscientiously the local benches are usually satisfactory and there is little criticism. Apart from the Report of the Royal Commission, however, they are given no guidance, and no attempt is made to supervise their work. The Lord Chancellor or the Home Secretary might profitably hold an inquiry into the results of the last thirty years' working of the system, which unfortunately is treated altogether too much as a hush-hush affair.

What seemed, however, to upset the members of my discussion groups more than anything else was the fact that amateurs are set to administer a code of penal statutes which is obviously complicated, and on which the liberties and happiness of so many depend.

The stock answer to this criticism is that they are guided on all questions of law by their clerk. There is, of course, a substantial element of truth in this reply, but it does not bear detailed examination. To begin with, the magistrates are not obliged to take the law from their clerk in the sense that a jury must do so from the judge. It is well known that they do not always do so, and even if they do that fact is not necessarily known to the accused, and does not constitute a satisfactory state of affairs, because the magistrates are in fact responsible for the decision arrived at, not the clerk.

The clerk is nevertheless in many ways the outstanding figure in the Court; and if a man of personality and long experience will often establish a dominating position with his bench, or, as it is often styled, will 'run' the Court.[25] As the clerk usually retires with the bench

[25] Report, para. 64.

when they withdraw to consider their decision, it naturally follows that in public estimation it is the clerk who is determining the case, and very often this is so in fact. In the words of the Report,[26] "there are few things more detrimental to justice than this." It is difficult to see how the clerk can successfully perform his function of advising the justices unless he retires with them. The Roche Committee regard it as "entirely proper" that he should do so. Their only suggestion for avoiding the difficulty to which they draw attention is that "the relationship of bench and clerk" should be "properly regulated in Court."[27]

The dominance of the clerk depends partly on personality, but much more on his superior knowledge of law and procedure which puts his justices at a serious disadvantage with him; the expert is too likely to be "on top," rather than "on tap." It can only be avoided if this feeling of completely inferior knowledge can be overcome, and this can only be achieved if the members of the bench are given a sound grounding in the general principles of the law which they administer, or alternatively have the advantage of the presence among them of one colleague who is learned in the law.

As Mr. Leo Page points out in his admirable book, *Justice of the Peace*,[28] it was the rule in the Middle Ages to appoint at least one member of the "quorum" who was "wise and learned in the law" (later it was two), and it was obligatory that such a magistrate should be on a bench handling cases of felony. The justices' clerk is a later innovation, and indeed the need for a learned clerk came to be realised in measure as the old rule fell into desuetude.

It must have been difficult even in the Middle Ages when benches were comparatively few to secure the presence of a magistrate learned in the law, and it would be interesting to know how far it was successfully accomplished, and the methods which were adopted. Although something might be done by the appointment of retired solicitors to strengthen benches, the only practicable method of securing the really expert leadership which is desirable is the appointment of a paid professional chairman for each bench. By the establishment of a system of circuits and by the re-arrangement of the days in which Courts sit, it would be possible for each professional magistrate appointed to take charge of several Courts.

This is not a new proposal. It has been tentatively suggested from time to time in the past that every bench should contain at least one competent lawyer,[29] and Dr. R. M. Jackson in his *Machinery of Justice in England* refers to the possibility of a combination of paid and unpaid magistrates. I am not aware, however, that the suggestion has been discussed with the thoroughness which it appears to me to deserve,

[26] *Ibid.*, para. 66.
[27] Report, para. 66.
[28] P. 18 and Appendix 2.
[29] E.g. by Mr. Leo Page in *Justice of the Peace*, and by Mr. Ensor in the work already cited; and now by a Conservative Party committee.

except perhaps by Mr. Ensor who makes an interesting suggestion based on the German Schöffen system.

Objection will no doubt be taken principally upon the score of expense. One of the substantial arguments in favour of the present system is that it is cheap. Justice is a commodity of so fundamental a character in the State that considerations of economy ought not to receive undue weight in discussions relating to its better administration. Cheap justice is not necessarily bad justice, but is so too often. The cost of providing a professional travelling chairman would, however, add only a fraction to the cost of the present system of Magistrates' Courts, and would not cost more than the proposal to replace the unpaid magistrates by stipendiaries which I have already examined. It would probably cost less than the main proposal of the Roche Committee, which is the substitution of whole-time for part-time clerks.

The only other objection of substance which is likely to be made is that benches should be free to select their own chairmen. The election, and more particularly the supersession, of the chairman as he gets past his work is a matter which causes much difficulty and heart-burning on benches. The seniority rule, a very bad one, is often adopted for this very reason.[30] My impression is that the majority of benches, so far from feeling slighted at the appointment of a professional chairman, would welcome it, if only because it relieved them of what is often a difficult and irksome duty.[31]

Whether or not this proposal be adopted it is highly desirable that steps should be taken to improve the legal competence of all unpaid magistrates, and if it is not adopted then this reform should be regarded as essential.

Magistrates have been exhorted for years past to devote time and study to mastering the elements of law and procedure. Many of them have always done so. It is well known that Blackstone's *Commentaries* was largely intended for the justices, and that it duly found its place in the library of every country house, not infrequently to become a well-thumbed textbook. Many country gentlemen after leaving the university have taken their call to the Bar with a view to qualifying themselves for this very side of the work of a conscientious country gentleman. I am afraid, however, that these are now a very small fraction of the whole, whatever they may have been in the past.

The periodical, the *Justice of the Peace*, together with its series of reports, which are of much value, and later the formation of the Magistrates' Association with its broadly interesting bi-monthly, *The Magistrate*, exist for the purpose of improving the competence of

[30] The Roche Committee condemn this practice strongly (para. 213), and the Home Secretary in a subsequent circular to Chairmen of Petty Sessional Divisions, has emphasised this part of the Report. The practice is one which will not easily be eradicated, and this is not the first occasion on which the Home Office has pronounced against it.

[31] In boroughs the mayor becomes chairman *virtute officii*; a system of which the Roche Committee say: "It is a matter of accident whether the bench obtains a suitable chairman (para. 217). Indeed it is long odds against their doing so."

Magistrates' Courts. Many books have been written, both technical[32] and of a broadly informative and suggestive character like that of Mr. Leo Page, with the same objective. In his commendably frank Foreword to this book Lord Roche says that justices should "try to learn their work and do it better than it is now done," otherwise they cannot expect to retain the confidence of their fellow citizens; "the less often benches act foolishly the better for the magistracy and for the State."

What can be done to solve this serious and real problem? General exhortations and even reading lists such as that provided by Mr. Page have a very limited effect. The suggestion which has been put forward in certain quarters that all magistrates should be required to pass an examination, would be much more likely to produce results, but it is unrealistic. The busy middle-aged or elderly men and women, who are, properly, selected for the office, neither could nor would pass examinations. Even the idea that such people can be expected to master elementary textbooks without guidance from skilled teachers is equally unrealistic. "A little learning is a dangerous thing," and perhaps nowhere more so than in the realm of law.

I do not think it unreasonable, however, to require a newly-appointed magistrate to attend for two or three months a special course of tuition in respect of his duties. The position, as has been pointed out, is one of honour and responsibility which is much sought after; the recipient of it should be prepared to make some sacrifice to equip himself to do the job efficiently. There would obviously be difficulty in many cases in securing time off from employment, and in regard to loss of earnings during attendance at courses. The State should, however, be prepared to reimburse such loss within reasonable figures. Justice has been the cheapest of the social services from the point of view of the Budget of the State, and it is time it received its allocation of the national expenditure under this head.

The practicability of such tuition has been proved by the numerous and highly successful courses run in connection with Civil Defence by the Ministry of Home Security, and by other Departments in connection with other war activities. These were largely attended by middle-aged men, many of them of the type chosen as magistrates. It was almost always possible to arrange leave of absence from their employment. The great majority of the men—and women—who attended the courses clearly derived great advantage from the tuition, and practical work provided.

Such a course would be both theoretical and practical. On the theoretical side the broad principles of those branches of the law which are administered in Magistrates' Courts would be taught. The elements of legal procedure, and more particularly the main rules of evidence, would be essential. For the practical application of these principles and rules a wide series of "moots" would be necessary.

[32] One may mentioned especially *Notes for New Magistrates*, by C. Leeson, published by the Magistrates' Association.

Particular attention should be devoted to the problem of punishment. It is here that magistrates are particularly without guidance, for the training of their clerk has not equipped him for this branch of criminal administration, and even judges have stressed the difficulty of this aspect of their work. McCardie, J., is said to have remarked that trying a man is as easy as falling off a log compared with deciding what to do with him when he has been found guilty. The majority of judges, both professional and lay, are woefully ignorant of the work which has been done in penology of recent years, or indeed at all. They rely upon common-sense. But by dint of constant practice stipendiaries develop an expertise which at any rate gives them an advantage over the lay magistrate, who will often go for months without having to consider problems of imprisonment, probation, etc.[33]

As Mr. Mullins says,[34] "before either a practising barrister or a justice of the peace aspires to do judicial work with criminals he might not unreasonably be expected to attend some lectures, and to read some books on penology and psychology." He ought also to get some practical experience of what goes on in prisons, borstals, and approved schools.[35] The practical side of the penology part of the course ought certainly to include visits to such institutions.

Finally, an attempt should be made to paint in the social background; the general conditions of society which lead to crime.

With a bench equipped for its work in this way[36] there would be much less danger of dominance by the clerk. In the absence of a professional chairman, however, they would naturally and properly continue to rely upon the expert advice of their clerk.

It is therefore essential that the clerk should be adequately equipped for his work. There has never been a hard and fast rule, however, that the clerk shall in fact be a qualified lawyer; for a person who has acted as assistant to a justices' clerk for fourteen years may in special circumstances be appointed, and a person who has acted as clerk to a stipendiary for seven years is eligible. In the Metropolis the clerks are appointed as a result of a special examination, and are generally very competent, but are not necessarily lawyers. Moreover, except under rare local Acts, the clerk's deputy, who in his absence assumes all his responsibilities, is not required by law to possess any qualifications whatever.

It is not common to find a justices' clerk who is not a lawyer acting with unpaid magistrates,[37] but it is obviously desirable that this should be no longer possible. The Roche Committee recommends that a professional qualification should become obligatory the office has

[33] See on this aspect R. C. K. Ensor, *loc. cit.*, pp. 87–8.

[34] *Op. cit.*, p. 218.

[35] A magistrate once told me that he had been asked by a fellow magistrate, "What is this Borstal to which we so frequently send these prisoners?" adding, "And he has been taking part in giving such sentences for years."

[36] The lay members of the inferior Courts in the U.S.S.R. are said to undergo a course of this type before taking up their work.

[37] Yet more than half the existing whole-time clerks are not professionally qualified.

ceased to be that of a personal servant to the justices, and has become a public one requiring the *imprimatur* of a proper public qualification.[38] In the case of the deputy, however, they go no further than to recommend that the position should be recognised by the appointment of a standing deputy. As to his qualifications they make no recommendation; but surely he should be properly qualified also. It should be possible to set up a panel of qualified deputies in each county, or sub-county, from which a clerk could be drawn when needed. The usual rule under which a justices' clerk must not act professionally in connection with business coming before his Court could reasonably be suspended for members of the panel.

The major consideration, however, in the case of justices' clerks as at present appointed is that they are almost always solicitors in private practice in the town where their bench sits. As has been indicated there are certain restrictions upon the work which such a clerk may do, in particular he may not either personally, or by his partner or clerk, act professionally in the Court of which he is clerk. But there are many kinds of work which a clerk may undertake in which his position may be of great advantage to him. The Roche Committee draws attention particularly to licensing work, pointing out that a clerk may undertake work for brewery companies and other interested parties, and that such a position "must lead to a suspicion of bias and interest on his part."[39] They accordingly recommend that he should be forbidden to undertake such work.[40]

There are, however, serious objections of a general character to a public office such as that into which the office of a justices' clerk has developed being held by a person in private practice. It is not only that there are many cases which cannot be made the subject-matter of a prohibition in which a conflict of interest may arise between the clerk's business interests and his public position; but it is no longer in accord with public sentiment that public offices should be held part-time by persons in private practice. It is too much to expect of human nature that the private interest on which the man's income, and therefore in this country his social position, depends should be invariably subordinated to his public duties which are accordingly likely to suffer in efficiency, if not in still less desirable ways. The public conscience is becoming more sensitive about these matters, and there can be little doubt that the existing duality of office which often gives rise to criticisms of the action of individual clerks, is one of the main factors in the poor regard in which the Magistrates' Court is so often held. As the Home Secretary has pointed out,[41] the situation is parallel with that formerly existing in local government generally when town clerks, treasurers, and other officials were often engaged in private practice. The solution is that like other government officials the clerk should become a whole-time officer. In this way he would be lifted

[38] Report, para. 116.
[39] Report, para. 85.
[40] *Ibid.*, para. 22.
[41] See his speech to the Magistrates' Association, *supra.*

above the local business and social interests which can cause conflicts of the type described.

Moreover, as Mr. J. Webster, the Town Clerk of Kensington, points out in an interesting address to the Magistrates' Association,[42] the profession of magistrates' clerk would then become a life-time career. Only in this way will a dynamic conception of its possibilities be gained, and a really expert team of such clerks be obtained for the community's service. Among the whole-time clerks in the Courts of the professional magistrates a number of outstanding personalities have already made important contributions. The part-timer, on the other hand, is likely to devote his main attention to the building up of his private practice.

In particular the whole-time clerk should be able to acquire the necessary knowledge and experience to be a real counsellor to his bench in matters affecting sentences. As the Roche Committee point out, the clerk is secretary to the Probation Committee of the justices, and his "relation with the Probation Officer should be close and sympathetic." It is to be feared that this state of affairs is by no means always attained. Part-time clerks who have their practices to look after are not in a position to maintain the necessary liaison with probation officers, nor to visit approved schools, borstals, or prisons. Nor can they be expected to keep themselves up with the latest practices in penology. With the rapid development of psychological methods of penal treatment it becomes more and more important that the clerk shall be able to provide his bench with informed advice in this branch of the work.

In the country districts and in small towns it is obviously not feasible to apply this proposal for whole-time clerks; there is nothing like a full-time job, and the expense would be out of proportion to the gain. The Committee therefore propose a regrouping and amalgamation of petty sessional divisions, which I have estimated above should secure a reduction in the existing Courts of anywhere from a half to two-thirds.[43] Even after this has been done it will often not be practical politics to appoint one clerk to each Court, and arrangements are therefore recommended under which a clerk may serve more than one division.

If the Roche Committee's proposals are adopted counties and county boroughs of over 75,000 population will become the units of grouping, and in some respects also of administration. In particular the Committee recommend that a new standing committee shall be set up of representatives of each petty sessional division in the area, which will become the employing authority for clerks, fix their salaries, and also accept responsibility for the necessary regrouping of divisions. In a note of reservation Lord Schuster, who was for many years Secretary to the Lord Chancellor, emphasises the need for entrusting to a central authority powers of initiation, where the local magistrates

[42] *The Magistrate*, November, 1944.

[43] The recommendation involves the abolition of separate commissions in boroughs of less than 25,000 population.

are remiss in carrying through this very substantial and somewhat onerous task. I think he is right in his contention.

Other important recommendations are made by the Roche Committee which I have only space to refer to shortly.

The present system by which the locality meets the expenses of its Court out of fines and fees is most unsatisfactory. Quite apart from the many anomalies to which attention is drawn,[44] there is one matter of overriding importance. The system "involves the risk or may give rise to the suspicion that the justices in fixing the fines might be influenced by the desire to relieve the rates of the area concerned" —the suspicion is widespread, and unfortunately in some cases is not ill-founded. It plays its part in the discredit into which these Courts have fallen. The Committee recommend that in future all fines and fees should be paid to the Exchequer, and a new system of financing the Magistrates' Courts be brought into being.

The payment of the clerks is also a matter of considerable importance. Under the present system the clerk receives an all-over payment to cover not only his personal remuneration but office, clerical, and the other expenes in which his office involves him. This system has long been a grievance with clerks. Under it the more soundly they organise their justices' work the less personal salary is left to them, and indeed some complain that they are actually out of pocket.[45] This increases the temptation to concentrate on their private practices, and in some cases the income from the justices' work is treated as a sort of subsidy to the latter. The Roche Committee strongly condemn the system, and recommend that the clerk should receive a personal salary; his out-of-pocket expenses being met independently.

Important recommendations are made for the improvement of the Courts and the procedure. In particular it is to be hoped that the proposal for a standing Rule Committee to advise the Lord Chancellor will be carried into effect. At the present time there is no authority able to deal with the procedure of the Courts. The Roche Committee, which was appointed by the Home Secretary, naturally avoid a frontal attack on this important issue, though they recommend that the Lord Chancellor should become the rule-making authority.[46] The present situation is absurd. The Home Secretary has acquired his relationship with the justices as a result of his responsibility for police matters, and though he has exercised it with discretion—perhaps too much so—it is obviously undesirable, as has been pointed out earlier, that the judicial and police aspects of justice should be mixed up. We here impinge upon a much wider problem, the problem of effectively organizing the administration of justice which will have to be tackled sooner or later, and which requires as a primary and fundamental stage in its solution the setting up of a Ministry of Justice. The Lord Chancellor's Department has of recent years shown signs of developing

[44] See Chapter VII.
[45] For some of the scandalously small salaries paid, see Report, para. 172.
[46] Report, paras. 220–229.

into such a Ministry. There is accordingly a strong case for transferring full responsibility for the supervision of the Justices' Courts to him, especially as he is already the authority for appointment and dismissal.

The Roche Committee also do not tackle the problem of the Court of Quarter Sessions. These Courts now, for the most part, have professional chairmen and deputies. Under the Administration of Justice (Miscellaneous Provisions) Act, 1938, they lose part of their jurisdiction if they do not obtain such appointments: an indirect method of ensuring a needed reform. They also now deal with appeals through appeal committees, instead of by the whole bench, a procedure which was occasionally something of a public scandal (Summary Jurisdiction Appeals Act, 1933).

These reforms are good so far as they go. The Court of Quarter Sessions, however, remains something of an anomaly. In particular it is not properly integrated with the Assize Courts, and the time has come for a thorough reorganisation and integration. If a system of professional chairmen was instituted it would be possible to hold the Quarter Sessions monthly, or even in the more populous counties keep it in constant session, and thus obviate the very real hardship involved in committal for trial often taking place some months before the trial can be held. This, however, is too large a subject for consideration at the end of a long article.

If I may attempt to sum up the whole matter in a page I should say that short of revolutionary changes of a fundamental character in the structure of society, the system of unpaid magistrates is too deeply rooted for there to be any measurable prospect of its abolition. That there is widespread discontent with it is obvious. In order, therefore, to prevent its remaining a social irritant there must be thorough-going reform. So reformed I think it would provide a good, and possibly the best practicable, tribunal for the particular sort of work which is entrusted to it.

In my view it is desirable that as many citizens as possible should be associated with the administration of justice. It is educationally valuable that they should have some practical experience of the working of the machine, and for this reason I deplore the gradual atrophy of the jury system which is taking place. We are too apt to consider technical efficiency as the only criterion in the administration of justice. At a time when it was under much hostile criticism at home the British system of unpaid magistrates evoked considerable admiration abroad, where its complete independence of the executive made a strong appeal. In Russia, during the period of liberal reform in the middle years of the last century, not only the jury system, but the unpaid magistrate, was introduced. But other countries have had legal institutions involving the use of amateur judges or assessors which are commonly reported to have worked well, and to have been held locally in high regard. Reference may be made particularly to the Schöffen in Germany.[47]

[47] R. C. K. Ensor, *op. cit.*, p. 68.

A man of experience in the affairs of the world at large is excellent material out of which to fashion a really good judge on questions of fact; much more so than the lawyer who has spent all his life in Chambers and Courts.[48] The trouble is that we have so far taken so little pains to see that this material is properly used. Maybe the Report of the Interdepartmental Committee indicates that a new era will open.

R. S. T. CHORLEY

[48] An experienced County Court judge, who is also a magistrate, is reported in *The Justice of the Peace*, CXVIII, p. 158, to have said: "So long as they have someone to keep them straight on the law a mixed bench is much more likely to do fair justice than one lawyer however good a lawyer he may be."

ANOTHER JOB FOR JURISPRUDENCE

IN the first issue of the MODERN LAW REVIEW, Felix S. Cohen began his paper on the subject "The Problems of Functional Jurisprudence" with the conciliatory but doubtful suggestion that functional jurisprudence could be defended "without attacking the doctrines or the achievements" of any other school.[1] This generous gesture of concord directed to antagonistic schools of juristic thought will not stand up under examination to-day. Indeed it was highly questionable when it was first penned in 1937. Mr. Cohen's provocative article "Transcendental Nonsense and the Functional Approach"[2] which was then in print and the present writer's criticisms of this paper,[3] disclose the jural chasm which separates the conceptual and the pragmatic jurist, the transcendentalist and the functionalist, the scholastic and the realist.

This gulf which divides jurisprudential scholars into two camps[4] is clearly depicted in the pages of C. P. Harvey's scholarly paper "A Job For Jurisprudence" in the April, 1944, issue of the MODERN LAW REVIEW. To strike the keynote of Mr. Harvey's interesting article, preliminary to a more critical examination, he implores the "academic jurist" to come down from his heaven of legal concepts and to deal with concrete problems in the law.[5] He urges the conceptual scholars to forego the study of Year Books and deplores research

[1] (1937) 1 MOD. L. R. 1.

[2] (1935) 35 *Columbia Law Review* 809.

[3] Kennedy, "Functional Nonsense and the Transcendental Approach" (1936) 5 *Fordham Law Review* 273; "More Functional Nonsense—A Reply to Felix S. Cohen" (1937) 6 *Fordham Law Review* 75. See also Mr. Cohen's reply letters: (1935) 5 *Fordham Law Review* 548; (1936) 6 *Fordham Law Review* 356.

[4] Professor Yntema calls the two attitudes of legal thinking "the fundamental and the scientific." "Law and Learning Theory Through the Looking Glass of Legal Theory" (1944) 53 *Yale Law Journal* 338. Compare Kennedy, *My Philosophy of Law* (1941) 147–160.

[5] Both Mr. Cohen and Mr. Harvey are insistent upon a down-to-earth appraisal of law, a descent from the "heaven of legal concepts," a juristic dive to "the pedestrian level of daily life." The same general criticisms used against Mr. Cohen (note 3) may be repeated against Mr. Harvey's critique of the common law with the addition of new material suited to the fresh approach made by Mr. Harvey in his current article.

into the "manumission of slaves in the reign of Hadrian." Instead, the proposed programme is to concentrate upon present-day legal problems; to divert their talents and time to subjects that really matter rather than waste their efforts on fine-spun cogitation that matters not.

Unlike Felix S. Cohen, Mr. Harvey is clearly not in a compromising mood regarding the tenets of other schools of jurisprudence. His complaint against classical jurisprudence is a very broad indictment. It is framed in fighting phrases. "If you once get a set of reasonably acceptable rules and a machinery for applying them which really works, you do not need any jurisprudence."[6] While this peremptory ejectment of jurisprudence in toto is like hurling the baby out with the bath it will shortly appear that Mr. Harvey, despite his complete dismissal of jurisprudence, has his own secret brand of legal philosophy which may tentatively be called pragmatic in its basic qualities. But now and later, let us not quarrel too much over labels. Some might call Mr. Harvey's approach functional, others might label it realistic, experimental or factual. The point of importance is that all the new schools are, although in different degrees, antagonistic to the traditional common law techniques. To borrow a helpful term from Jerome Frank, the new legal *isms* are alike marked by the common quality of the "againstism" aimed at the common law. In this respect, and I think correctly, Mr. Harvey refuses to extend the olive branch of peace to the conceptual schools of juristic thought on any other terms than "unconditional surrender." Yes, there is a great divide which separates functionalism from transcendentalism, realism from scholasticism, idealism from factism. Up to the moment there seems to be an irreconcilable difference between these clashing philosophies of law. Because of these issues I desire to make reference at some length to the debatable and arguable phases of Mr. Harvey's paper which arouse adverse comment of the conservatives in the law.

Continuing the present objective of a general paraphrase of Mr. Harvey's learned article, he offers as his principal task the disclosure of the ancient and crumbling principles of the common law and their inability to solve the pressing problems of the moment. He poses some practical problems to prove his point. For example, he refers to the rapid development of hire-purchase agreements following the advent of the motor car and the consequent economic, financial and legal problems unknown and unknowable to the "jurisprudes" in earlier years. With the auto-car came the Finance Company (the "fairy godmother of the motor car hire-purchase"), and in its train followed the Fraudulent Dealer (the villain of the hire-purchase era), who frequently defrauded both the Finance Company and the Customer. Inevitably, the hire-purchase melodrama is complicated by troublesome questions of law. Out of this situation Mr. Harvey asks a series of questions directed to the scholars of jurisprudence: What solution has jurisprudence offered for all this? What good is their "systematic

[6] P. 42.

synthesis of interrelated principles of law in this worldly mess"? His point seems to be that omniscient jurisprudence has no practical solution and could have none for the vexatious complications arising out of the hire-purchase of autos, furniture and vacuum-cleaners. These current questions, he argues, "show how wide is the gulf between established legal principles and the social conditions of to-day, a chasm to be bridged in defiance of logic and legal theory and solved by 'realistic improvisations.'"

Just why jurisprudence alone is expected to have a ready-made solution, seemingly to be extracted like the proverbial rabbit from the magician's hat, is not revealed by Mr. Harvey. It may be permissible to recall that the final solution of these current problems was not found overnight even by the realist or pragmatist; they have been worked out painfully through the processes of trial and error, and—we maintain—with the good will and co-operation of the conceptualists. Why blame the poor principle-ridden theorists for the delay in meeting the novel situations caused by the hire-purchase agreement? Mr. Harvey does not make it clear what "defiance of logic and legal theory" was involved in the "realist improvisations" that finally solved the legal puzzle emanating from the hire-purchase contracts. Because Jurisprudence had no ready-made card index with separate entries marked "hire-purchase" or "fraudulent dealer" this does not prove that jurisprudence had no just or reasonable or fair standards, rules and principles to be applied to this novel situation. One is reminded of Justice Holmes' pertinent tale—

> "There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."[7]

To-day there is a growing danger that our legal reformers are making a fetish of facts as though the related legal problems are solved if we can only collect all the diverse data relating to motor cars, chewing gum or hair tonic. Conceding freely the old evil of a mechanical jurisprudence of concepts,[8] are we not facing the greater evil of piling up statistics, graphs and questionnaires in the belief that a catalogue of the facts will automatically solve the legal problem? The "tyranny of tags and tickets," to use Justice Cardozo's phrase, is now returning to plague the advocate of the functional approach. The pragmatic endorsement of the "rule that works," or of "fact-finding," or of the "realistic solution" as a substitute for "legal concepts" or "airy abstractions" in the law may be merely a substitution of a new chain of "inadequate catchwords."

But the basic fallacy, argues Mr. Harvey, "is in the elevation of jurisprudence to the status of a science." It is certainly true, as

[7] (1921), Holmes, *Collective Legal Papers*, p. 196.
[8] Pound, "Mechanical Jurisprudence" (1908), 8 *Columbia Law Review*, p. 605.

he says, that law is not a science or is at best a speculative science. But many of his brethren in the pragmatic and realist schools are seemingly unaware that the bordering disciplines, invoked to solve the current problems of law, also fall far short of precise scientific stature. Psychology, economics, sociology and semantics—all very dear to the pragmatic jurist—are also far removed from the certitude of knowledge that surrounds the physical sciences.[9] This does not mean that the law-men can escape or excuse their own limitations by pointing to the shortcomings in neighbouring laboratories. But it does warn that legal scholars are not going to solve their problems by the easy expedient of inviting economists, psychologists, phrenologists, hunch-advocates,[10] stomach specialists[11] or social workers to take over the "job of jurisprudence."

To apply the foregoing generalizations to Mr. Harvey's paper, no conservative jurisprudential scholar would question the value of collecting all the pertinent data regarding the hire-purchase agreement, the operation of the Finance Company or the sinister practices of the Fraudulent Dealer. All this fact-finding is necessary and helpful in the solution of the involved legal problems. But having found the facts, the pragmatic jurist, no less than the conceptual scholar, must still find the legal solution. Some norm or standard, new or old, must be developed and applied. President Robert M. Hutchins, of the University of Chicago, states this point clearly—

> "Empirical operations do not make a science. Facts do not organize themselves. Let me emphasize as strongly as I can that we must accumulate cases, facts and data. I simply insist that we must have a scheme into which to fit them."[12]

The "scheme" proposed by President Hutchins pays full tribute to the importance of vigorous investigation of all the facts, but it also insists upon the continuing and ever-present importance of the development and refinement of "the principles and rules which constitute the law."

Mr. Harvey then warms to the task of proving that the main evil of traditional jurisprudence is its slavish devotion to and defence of the common law with its devious ways of refurbishing ancient landmarks, distorting old rules to meet the needs of a progressive society, and bulking the conglomerate mass of evasions and nonsense into a sort of "supernatural organism" which we call, with bated breath and lowered eyelids the Lady of the Common Law. He

[9] The present writer has considered the unscientific aspects of the social sciences in two papers, "Psychologism in the Law" (1940), 20 *Georgetown Law Journal*, p. 139; "A Review of Legal Realism" (1940), 9 *Fordham Law Review*, p. 360. Compare Mr. Cohen's reference to "such positive sciences as economics and psychology." *Op. cit. supra*, note 2, at p. 821.

[10] Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision" (1929), 14 *Cornell Law Quarterly*, p. 274.

[11] Realists have made occasional reference to the possible importance of a "gastronomical approach" in evaluating judicial decisions.

[12] Hutchins, "The Autobiography of an Ex-Law Student" (1934), 7 *American Law Journal*, pp. 1051–1055.

leaves his readers in no doubt about his extreme anti-common-lawism, and his violent opposition to the works and theories of Maine, Holdsworth and other English historians, concluding with a special criticism of Sir Frederick Pollock, the "unchallenged high priest of this cult," who made a goddess of the Common Law cynically described by Mr. Harvey as "an immortal old lady, always half asleep but never quite oblivious, . . . never too torpid to lift an antique eyelid at the slightest symptom of disorder."[13]

This is a pretty severe indictment written in a most sarcastic manner and calling for the termination of the reign of the Lady of the Common Law. Enthralled by the picturesque language of Mr. Harvey's funereal farewell, it is difficult to resist the temptation to sketch out the opposition Kingdom to be erected by the practical men of the law. Here dwelleth the followers of Functionalism, creating the modernistic Olympus which has for its first task the eviction of the musty absolutes of the classical traditions, displaced in the Stratosphere of Science. Here in the Elysian field of social sciences, one rubs against things "as is" divorced from any "ought" principles. Gone are the airy concepts and legal formulas of the Heaven of Abstractions. Here one finds all sorts of mechanical contraptions capable of grinding out all the facts without error: lie detectors which reveal the tentative truths and postulates of the legal order, electrical devices capable of measuring the state of the judge's digestion and its probable effect upon his judicial decisions; and the latest device of all, judicial radar, guaranteed to decide all legal questions automatically with the whirl of a knob.

But we resolutely resist the temptation, elsewhere attempted,[14] to contend in metaphorical style that scientific jurisprudence, no less than traditional law, has its fringe of nonsense; that Mr. Harvey's fellows in the functional field are inclined to nod occasionally no less than the Goddess of the Common Law. Yes, the dear Lady has her faults, many and substantial, but the remedy is not to remove the doddering Goddess from her throne before we investigate her health and character. In any event, before we dismiss her, she is entitled to her day in court, the same day that she has granted to her subjects down the long years of her reign. Such is the law of the land—in America and in England. This day in court, we suspect, will produce the same verdict pronounced several years ago by Chief Justice Stone—

> "Whatever its defects, the common-law system, deep rooted in our tradition and habit of mind, after serving us for some six centuries, will not be discarded. In the role of critics and prophets we will do well to accept that as the probable verdict of history."[15]

After Mr. Harvey has completed his denunciation of the common

[13] P. 48.
[14] Note 3, *supra*.
[15] Stone, "The Common Law in the United States" (1936), 50 *Harvard Law Review*, pp. 4, 7.

law, he follows the pattern of the legal reformer by proposing remedies for the "hotch-potch of barbarities, accidents, evasions, customs, prejudices, horse sense and nonsense which we call the Common Law. . . ."[16] It is to this all-out feature of Mr. Harvey's paper we now direct special attention. He opens the constructive phase of his argument by outlining the substituted methods which he offers in displacement of classical jurisprudence. His key principle is set forth in the following words—

> "The point is, that the ultimate and only proper test of law is not whether it answers to certain concepts believed to be basic by philosophic thinkers or whether it presents on paper a symmetrical appearance, but simply whether it works—whether on the pedestrian level of daily life it answers the needs and resolves the difficulties of the common man, to whom the stratosphere of jurisprudence is as uninteresting as it is remote."[17]

This formula is framed in the best tradition of Peirce, Dewey, and James, American pragmatists, and in the spirit at least of the utility-formulas of Mill and Bentham. It is essentially a practical proposal and argues for the shaping of legal rules after the events that created the problems. Law would be pronounced for the day only after the style of a railroad excursion ticket. Needless to add, Mr. Harvey's proposal leaves no place for natural law or for a static positive law, but tends to substitute trial and error for precedent, and to minimize the doctrine of *stare decisis*.

Mr. Harvey then follows with concrete proposals which offer an excellent proving ground to compare the respective merits of traditional law and his pragmatic substitutes. Descending from the "stratosphere of jurisprudence" (where he locates the domicile of all conceptual jurisprudes) and reaching the "pedestrian level of daily life," the proponents of legal principles propose to test out the principal palliatives which Mr. Harvey offers for the purpose of improving the administration of justice. We promise that our approach will be in the best pragmatic manner (making due allowance for a conceptual bias). Ours will be a constant search for the jural system which will *work*, a submersion of the appeal to sacrosanct doctrines and omniscient extracts from the heaven of legal concepts.

But first: a preliminary observation. Pragmatism is essentially a protest; James calls it philosophic protestantism. Legal pragmatism is also a protest—legal protestantism—a protest against the common law and a critique of its ability to regulate changing societal and economic relations. Since legal pragmatism is in substance a counter proposal squarely antagonistic to the common law, the burden of proof that legal pragmatism can be successfully transplanted into the law is upon the proponents of the new programme. It is necessary and proper that the critics of the existing common law prove that their

[16] P. 48.
[17] P. 49.

substitute is workable and efficient before the common law is discarded. Plans and specifications of the new streamlined pragmatism in the law must first be tested. There is common-sense as well as common law in defence of this proposal: that we know with reasonable certainty what we are offered by Mr. Harvey before we consent to the razing of a structure that has functioned at least continuously for six centuries. With this condition precedent in mind we are now ready to descend from the clouds of conceptual jurisprudence, walk on the solid ground of pragmatism and test out the general programme tentatively proposed by Mr. Harvey.

The three proposals of Mr. Harvey are: (1) simplification of procedural rules and the reduction in the cost of litigation; (2) nationalization of the legal profession; and (3) an over-all system of State insurance not only to underwrite the risk of a litigant's liability for damages but also the costs of the litigation itself—all to be paid by the government.

The first proposal for the simplification of procedure and the reduction in the cost of litigation is certainly one that merits the support of all jurisprudential scholars regardless of adherence to any particular shade of juristic thought. So far as I am aware, Mr. Harvey's first proposal would receive support from all philosophers in the law. All would join hands in his commendable objective to curb the complexities of pleading, to lessen the law's delay, and to provide simple and practical remedies for the enforcement of all judgments. The jurisprudential scholar must bear his fair portion of the blame for the admitted failure to face and to solve this problem which Mr. Harvey states is a most important one. In his words, "unless the adjective law of procedure is a working machine, constantly translating these obligations in terms of Court orders and actual execution, the substantive law might just as well not exist." But there is a bit of concealed humour in Mr. Harvey's expression, or at least implication, that this is distinctly a "job" for the scholars and not for the "practitioners" who are "too exhausted" to devote attention to reforming their own machine. Once more we ask: Why pick on the scholar for failure to do a "job" distinctly *practical*? Why excuse the practising attorney for this failure? Why not at least apportion the blame so as to include the practical men of the law, the so-called pragmatic lawyers, who are unable to propose effective reforms "because the labour of minding their outmoded machine leaves them too exhausted to think about improving it"?

But we need not pause longer with Mr. Harvey's first proposal of procedural reforms. He states that even if these procedural reforms were fully accomplished, there would still remain the financial problem. As he succinctly states it, "However much you cheapen and simplify it, litigation is always going to cost money and the question is, where is that money going to come from?" If the simplification of procedure were fully accomplished the result would not satisfy him. He makes the discovery that under the most Utopian plan of procedure

"litigation is always going to cost money"—a terrifying thought which moves him to propose his all-out, two-pronged formula to end for all time the reign of the Lady of the Law who dwells in the clouds, and to substitute for her a new creature whom we might call Peter Pragmatism—the practical man who is going to walk at the pedestrian level and solve all legal problems without slavish adherence to the precedents—and without cost! In some fashion or other it seems that the disbursements of money by litigants in the pursuit of justice is a barrier which must be removed, not partially but completely, in order to bring about the new era so vehemently defended by Mr. Harvey.

He drives forward to his second proposal: The nationalization of the Bar. Mind you, we are not now interested in the internal functioning or mechanical operation of the novel proposal to distort the freedom of the Bar into a strait-jacket under complete control and subsidy of the State. We do not pause to consider the material evils that might possibly be brought about by this major change in the age-old relations of attorney and client and the intimate and personal elements of such fiduciary relationship. We pass all these important matters for the moment. Let us assume the full and complete nationalization of the Bar with the State machine purring sweetly and with each little attorney, counsellor and solicitor assigned to his appropriate cubicle while working without stint to make Mr. Harvey's State-operated and State-financed system a success.

We propose a pertinent question which inevitably must be faced at the very threshold of this programme: What necessary changes in the substantive or procedural aspects of the common law will follow the nationalization of the Bar? Let it be carefully recalled that Mr. Harvey is framing a programme which has as its first objective the erasure of the nonsense and shortcomings of the common law, the elimination of arid principles and moth-eaten precedents and the substitution of a live, up-and-coming formula which will revitalize the decrepit and moribund legal order. What substantive effect will the nationalization of the Bar have upon our present-day Maines or Holdsworths or Pollocks and their discredited notion of Traditional Law? Assume that the United States Bar follows suit and that nationalization sweeps through the forty-eight states of the Federal Union: How will his elimination of the costs of litigation or liability bring about *per se* any shift from the traditional law with its empty principles and its airy concepts? May we not have our Wigmores, Beales and Willistons even under the nationalization of all attorneys?

It may be admitted in all fairness that the nationalization programme might be more acceptable to the so-called pragmatic or realist jurists, in the American scene at least, than among their more conservative brothers on the Bench or at the Bar. On the other hand, I can think of many pragmatic or realist jurists who would differ violently on the merits of pragmatism *versus* realism and yet might well be united in their refusal to accept the goose-step of State-regulated barristers.

These preliminary thoughts sum up to this pertinent and important conclusion. His nationalization programme has absolutely nothing to do with the legal reforms which he is seeking to bring about by fundamental change of the common law. Otherwise stated, the common law with all its barbarities, accidents, evasions, customs, prejudices, horse-sense and nonsense, could remain in full force and effect under the proposed State subsidy of law. It is, of course, true that pragmatic jurisprudence could also be introduced within the framework of a State-operated Bar. But it is not in any wise necessarily interlocked with this nationalization plan.

Passing to the main evils of the nationalized Bar, a few of the outstanding difficulties which must be considered and weighed are now briefly catalogued. First of all, it will not be sufficient to nationalize the Bar and then to provide that each litigant is privileged to draw an attorney from the common pool or panel in rotation—as one draws a lottery ticket from a hat—and conclude that the objectives of Mr. Harvey are automatically and completely satisfied. If his plan is to function as it is intended, it must provide equal treatment for all. The leaders of the British and American Bar must be available for the humble as well as wealthy litigant. The real cost of litigation does not end by providing a lawyer for all contestants. He must see to it that good lawyers are provided for each litigant or else the cost of litigation lingers on even under the full blossoming of the Harvey programme. A failure to provide a good lawyer, especially when he is pitted against an outstanding lawyer on the other side, may be reflected in the lowering of the amount of judgment obtained or even a complete loss of a worthy cause because of the errors of inexperienced counsel. Again, the cost of litigation must include the providing of able investigators to search out witnesses, examine records and do the many other preliminary acts which fall under the control of the attorney in America or the solicitor in England.

How can the able lawyer properly prepare his case unless the client is guaranteed complete and expert assistance in the search of the facts? Mr. Harvey would hardly be able to deny logically the necessity for these additional items as parts of his nationalization proposal, for he has gone to great length in his description of the current factual changes and the novel legal problems that followed the advent of such inventions as motor cars and washing machines. Facts are important, more important seemingly than legal concepts. So he argues. Then let us at once propose a sweeping amendment to his State-operated legal profession, a proviso that an army of government fact-finders, experienced, well paid and equally trained, be sent forth to locate witnesses, examine corporate books, investigate rumours—to the end that all litigants, already provided with the best lawyers to conduct the judicial stages of the litigation, may also be assured of a thorough examination into the facts. Lest it be thought that this apparent attempt to reduce Mr. Harvey's proposal to a *reductio ad absurdum* is a fantastic and straw-man argument, I direct attention

to the fact that this very issue was recently debated by two able judges of the United States courts. Judge Jerome Frank of the Circuit Court of Appeals made this general contention that fact-finders should be paid by the State in order that the case of clients, otherwise incapable of going to court, might be fully prepared.[18] The counter-arguments were made by Judge John C. Knox of the District Court.[19]

Let it also be duly noted that even the best lawyer and the best investigator cannot unitedly or singly foretell the outcome of investigation or litigation. They cannot possibly predict the result until the investigation has been made. Then only will the counsel be able to advise the client to sue or to settle. The practical operation of Mr. Harvey's programme must include a nationalized Bar, and a nationalized investigating force for plaintiffs and for defendants as well available prior to the trial. A programme so staggering must at least give us pause.

But the preliminaries of the programme to nationalize the Bar suggest other more pertinent questions: Will this programme function? Why not? asks Mr. Harvey. But he concedes that the proposal of a nationalized Bar is indeed "too strong meat for most legal stomachs." One may continue his figure of speech and suggest that it might bring on juristic indigestion! His proposal of a Bar regulated by the State, manned with bureaucrats, charged with politics and wholly divorced from the personalized and confidential relationship of attorney and client is not a very reassuring one.

But let us return to the main issue. Even if the legal, procedural, economic and political difficulties of a nationalized Bar were eliminated, this sweeping change by itself would not bring about a single reform in the "hotch potch" which we call the Common Law and which Mr. Harvey is aiming to reform. While he is convinced that his Bar programme is sound, he concedes that for the present "something less radical may be more acceptable."

We therefore advance to the brief consideration of the third and last proposal of Mr. Harvey's plan aimed—let us recall it once more because of its great importance—to get rid of "so-called basic principles" and "intricate entanglements" of the common law that might easily be diminished by his common-sense reforms offered as simple substitutes for the legal complexities of the decadent common law.

What is the third part of his programme which he promises will be "*less radical*" in nature? What is this method which he promises will bring down the law from the heaven of legal concepts to the "pedestrian level of daily life?"

His panacea is universal, complete insurance coverage which will not only protect any and all poor persons against all legal liability, but also pay the costs of all litigation for both plaintiff and defendant. "What is needed," says Mr. Harvey, "is a comprehensive national

[18] Jerome Frank, "White Collar Justice," *Saturday Evening Post*, July 17th, 1943.

[19] John C. Knox, "Just Justice," *Saturday Evening Post*, July 24th, 1943.

system of insurance against litigation in general for persons whose income level does not permit them to stand up for their rights on their own feet."[20] This is certainly an awesome programme, however sound or practical it may be, and raises at the outset the question whether this third part of his programme is really "less radical" than the nationalization of the Bar tentatively proposed by Mr. Harvey. It is seriously suggested that in its logical and inevitable developments the all-out insurance programme of Mr. Harvey matches, if it does not exceed, the foregoing plan of a subsidized State Bar. As I read it, his insurance policy clearly aims to provide for the costs of litigation and to protect the rights of the poor *plaintiff*. Very good. But how about the underwriting of the duties and the risks of the poor *defendant*? A pauper as well as a prince may cause damages to another, negligently or wilfully. A person, so damaged, may be poor or rich. It is not clear whether the Harvey insurance plan extends to such a case. Would Mr. Harvey limit the poor defendant-aggressor's insurance coverage to the costs of *litigation* and excuse him from *liability* if he is adjudged responsible for negligent or wilful wrong to the plaintiff? Just as the private motorist is protected from both liability to pay compensation to the injured party and also avoids the cost of litigation in the same action, so it would seem that a similar breadth of coverage must necessarily be an ultimate phase of Mr. Harvey's newly discovered heaven of insurance. Nor can one consistently escape this suggested step of liability coverage for every poor defendant by saying that he is not interested in the defendant's *obligations* but only "in the position of any poor litigant who is confronted by an opulent adversary."

Two answers seem to destroy the justice of this partisan protection of the poor litigant who is given both a sword and a shield, a sword to pierce the armour of any defendant who is *obligated to him*, and a shield to prevent any plaintiff, opulent or pauper, from *collecting from him*. The opulent or poor adversary as party plaintiff has rights to seek reimbursement for wrongs done by any defendant regardless of the latter's financial standing. The plaintiff suing the pauper defendant may himself be a poor person. Is he not entitled to something more than protection against the costs of litigation? Should he not be guaranteed a collectible judgment as well? Any other solution would create a selfish and unjust egoism which would tend to cause clashes within the social order on the ground of inequality.

Logic, justice and pragmatic arguments unite to broaden Mr. Harvey's programme. Before it is completed it must be extended to all litigants and all liabilities of all kinds—civil, criminal and administrative—wherein a poor plaintiff or a poor defendant faces the costs of litigation or liability for damages. So stated this diffused insurance programme is not "less radical" than the nationalized Bar in its ultimate implications. A more leisurely examination of the other long-range consequences of his insurance-for-all panacea convinces that this universal underwriting of all the risks of litigation and liability

[20] P. 52.

is fraught with sinister consequences more penetrating than the subsidized Bar.

It is true that the insurance palliative does not necessitate the nationalization of the Bar, but it certainly does liquidate the legal profession by substituting a super-Leviathan of gargantuan dimensions in its place. It necessitates the institution of a pyramid of boards and commissions, *agents provocateur* and State Gestapos all equipped to put into full force and effect the insurance behemoth; not by a trial of the cause of action in an ordinary judicial manner but *mirabile dictu* by means of preliminary hearings held before some vague official or quasi-official appointed not to decide the issue but to decide whether the claimant has a right to litigate the issue at the expense of the State-insurance Santa Claus! Mr. Harvey with stark realism faces the probability (one might say certainty) of an avalanche of fake claims, perjured statements and fantastic stories of feigned wrongs — all to be paid for by the elephantine insurance corporation which balloons forth under the magic of his formula. Instead of these multitudinous claims being litigated *once*, they must now be litigated *twice*: First, before the quasi boards who must be persuaded that the claim is a *meritorious* one before suit may be filed, and again in the regular trial which follows. This double-decked investigation, litigation and examination before final adjudication will cost money, a lot of money. Mr. Harvey frankly admits that pertinent fact. His simple and rather naïve avoidance of the costs of the operation is summed up in the following sentence: "At any rate, the difficulty of squeezing money out of the community where it was really wanted has never yet been found to be insuperable."

After offering his proposal of staggering dimensions, Mr. Harvey concedes that this cover of insurance protection is going to cost money, lots of it. He is quite content to raise the umbrella of all-over protection and then to walk away. Let someone else get the funds and fix the rates. Not only are these financial difficulties admitted and unsolved by Mr. Harvey, but he also freely confesses that there are other objections to be eliminated. Then follows his surprising solution: "If they [difficulties of his insurance plan] are adjudged to be fatal to this scheme, let those who advance them think of another scheme." This last bit of juristic pleasantry deserves a brief development before moving forward to the next point. Mr. Harvey having proposed a definite programme, his programme, and having admitted the difficulties and deep-rooted objections to his programme, concludes by the observation that if his scheme is unworkable let his opponents think of some other scheme to take the place of the common law. The opponents might properly retort that until and unless Mr. Harvey and the critics of the present legal system are able to provide a better one, the only sensible thing to do is to leave the present system stand.

The burden of proof remains throughout on the critics of the common-law techniques and this burden of proof has not been

sustained. Mr. Harvey's insurance proposal creates a sprawling edifice of State insurance with top-heavy boards and bureaus, permeated with governmental inefficiency and bureaucratic bungling—all offered in the name of "comparative simplicity."

Mr. Harvey follows the functional pattern throughout his paper. First he criticizes in severe terms the breakdown of common law. He then proposes to offer a prescription and cure. Dealing with glittering generalities, skeletonized proposals, mentioning the major difficulties, but skirting carefully the solution of the same, he asks the dwellers in the common law household to tear down a six-century edifice and to erect a house whose plans and specifications are not yet in the blue-print stage. When faced with the yawning chasm between his plan and performance, Mr. Harvey walks away with the rejoinder: "Very well. You find us a better plan." To which the harassed traditionalist meekly retorts: "But this reform agitation comes from you—not from me. It is your task to defend your proposals for an effective reform of the common law."

Reviewing together the three proposals herein made by Mr. Harvey: (1) The simplification of procedure; (2) the nationalization of the Bar; and (3) litigation and liability insurance, the following conclusion seems to be appropriate. Not one of these proposals singly, nor all three together, settle or even touch directly the main complaint which Mr. Harvey makes against the common law as a "hotch potch of barbarities, accidents, evasions, customs, prejudices, horse-sense and nonsense, which we call the Common Law. . . ."

It is respectfully submitted that his proposed simplification of legal procedure could be accomplished, a nationalized Bar in full effect and his insurance plan in execution; and yet all these major reforms would in no wise change the "transcendental nonsense" of the common law so bitterly assailed by Mr. Harvey.

In his concluding paragraph Mr. Harvey suggests that the academic jurist should descend from his Olympian fastness, to divert his attention from abstract jurisprudence and to work at the level of the ordinary citizen. While this paper has been devoted in major part to a criticism of Mr. Harvey's particular proposals, it is conceded that his criticisms of the common law indicate that there is a "job for jurisprudence to do."

But the suggestion is made that there is "another job for jurisprudence," and particularly for our legal reformers, who are sometimes prone to confuse change with progress. Marx somewhere complains that Savigny gazed so long at the source of law that he forgot the stream—a remark that Mr. Harvey would doubtless applaud as an accurate appraisal of the moon-gazing propensities of conceptual jurists. But a very liberal paraphrase of the Marxian comment might warn that the pragmatist and the realist reformers in the law are gazing so intently at the current stream of the law that they have forgotten its sources. In fact, the extremists are contending that there are no sources of the law; that law is an individualized product of the

courts handed down from case to case and from day to day without any weighted reference to past precedents or general principles.

Justice Holmes once stated that general propositions do not decide concrete cases, but the fact-collector, who over-emphasizes concrete circumstances, divorced from principle or precedent, is apt to find himself immersed in a mass of puny particulars without order, plan or objective. The "job" for jurisprudence which Mr. Harvey proposes for the concept-ridden jurists of traditional law is the descent from the stratosphere of abstractions to the ground-level of actuality, a descent from the heaven of legal concept to the "pedestrian level of life." Another "job" has come into being with the arrival of pragmatic, realist and experimental techniques. In place of the Holmesian aphorism that the "life of the law has not been logic; it has been experience," the common law defender offers the Thomistic substitute proposal that the life of the law has been logic *and* experience. While the common law devotee is not averse to all changes in the common law, he suggests that it is not only helpful but necessary to know where we are going before we launch a new juristic system. Such appraisal and evaluation are frequently absent in the tentative programmes of our legal reformers. Substantial evidence of this fault seems to be present throughout Mr. Harvey's scholarly paper.

WALTER B. KENNEDY*

* Professor of Law and Acting Dean, Fordham University School of Law, New York City.

STATUTORY POWERS AND LEGAL DUTIES OF LOCAL AUTHORITIES

THE Law Reports show a steady increase in actions for damages brought against Public Authorities arising out of the exercise of some public function. It is, of course, in no way surprising that, with the vast increase of public services and duties—greatly augmented by war-time responsibilities imposed upon local authorities—the possibilities of injury to private persons should also increase. It is rather more surprising that the great legal and jurisprudential problems of this development have hardly been noted. Volumes of discussion about the modern interpretation of the rule of law have centred round the more spectacular features, such as the archaic immunity of the Crown from tort actions, and the increase of judicial or quasi-judicial functions vested in administrative authorities or special tribunals. At first sight, the increase of actions for damages against public authorities does not seem to call for comment. A Borough or County Council, a Catchment Board, the B.B.C., the Port of London Authority, constituted as juristic persons, are fully liable, like any other legal person; this seems to vindicate, not to challenge the orthodox interpretation of the rule of law. A more thorough examination reveals a different state of affairs. Time and

again, recent cases have revealed the difficulty of treating the excercise of a social function or a public duty in the same way and with the same legal categories as a contractual or delictual relation between private parties. The result has been a conflict of authorities and a confusion of principles which is becoming serious.

The difficulty of dealing with such matters as the official visits of factory inspectors or policemen to private premises, or the admission of the public, ratepayers and others, to public parks, by means of the private law categories of invitees and licensees has been discussed elsewhere.[1] The present article is concerned with another aspect of the same broad problem, brought into prominence by recent cases. Two groups of cases in particular illustrate the legal position of local and other public authorities, entrusted with a public function, in the interest of the general public or a section of it, the exercise of which may lead to private injury. Of the first group, the most recent and authoritative illustration is the decision of the House of Lords in the *East Suffolk Rivers Catchment Board* case.[2] In the second group, the House of Lords has not yet spoken. But a vast number of decisions by lower courts deals with the position of local authorities whose statutory duties or powers have been affected by war-time regulations (mainly the Lighting (Restrictions) Order, 1939), and probes into the complex problem of the relation between statutory powers, public responsibilities and common law duties.[3] In this group, it is almost impossible to find any two decisions based on the same principles. What makes things worse, is the narrow and unsatisfactory method of dealing with precedent. One would, for example, have expected the *East Suffolk Catchment Board* case to be cited in the different black-out cases; for the basic problem of statutory power in relation to common law duties is the same. Yet one group of decisions proceeds in almost complete isolation from the other.

It will be submitted that only a proper consideration of the principle of public policy involved—namely the extent to which public authorities must remain unhampered by private liabilities in the exercise of a social function as defined by Parliament—can lead to a clarification of this increasingly important subject. The first task, however, is an analysis of the authorities as they stand at present.

The decisions to be considered in this article—in all of which a member of the public claims damages for injuries to person or property suffered by the action or inaction of a public authority in the exercise of a statutory power—revolve round six major legal problems:—

1. The question to what extent a statutory power implies a statutory duty.

2. The interpretation of a statutory power as absolute (imperative) or conditional (permissive).

3. The exercise of a statutory power in a reasonable manner,

[1] "Liability to Visitors of Premises," 21 *Can. Bar. Rev.*, p. 80 (1943).
[2] [1941] A.C. 74.
[3] For a brief tabular synopsis of the most important cases, see Appendix.

that is in a manner incidental to the nature of the power and without negligence.

4. The question to what extent a statutory power affects the general common law duties owed by a public authority, like any legal person, to the public.

5. The question to what extent a statutory power (or duty) to erect a structure for the public benefit implies a legal duty to maintain it in a proper state, so as not to endanger the public. Sometimes this problem is stated in a slightly different way as the duty not to lay a trap.

6. The question of the circle of persons protected by any legal duty owed by a public authority to the public.

All these questions appear, singly or jointly, in the different decisions. In addition, considerations of public policy appear in some of them. The result, at present, is a state of confusion equally unsatisfactory to the law-seeking public, the public authorities concerned the legal practitioner and the science of law.

I. Statutory Powers and Statutory Duties

The majority of decisions illustrate a principle vital to the successful discharge of social functions by administrative authorities. The function is entrusted to the authorities by way of conferring a power, not of issuing a command. This ensures that they retain proper discretion as to the manner of fulfilling their task. Sometimes a clear statutory duty is expressed, as in the Metropolis Management Act, 1855, which imposes a clear obligation upon local authorities to light the streets. This leaves the further question as to the circle of persons protected by such a duty[4]; but this problem does not appear to have directly arisen in recent cases,[5] though it indirectly enters in the case of *Fisher* v. *Ruislip-Northwood U.D.C.*[6] to be discussed below. The normal practice is illustrated by *Metropolitan Asylum District* v. *Hill*[7], and *East Suffolk Rivers Catchment Board* v. *Kent*.[8] The former case in which a public authority was restrained from erecting a smallpox hospital in a place where it was held to constitute a nuisance to residents was concerned with the terms of the Poor Law Act, 1867 (Sect. 7), directing that "for each district there shall be an asylum or asylums, as the Poor Law Board may from time to time direct"; by the Act left the Boards full discretion as to the conditions of purchase and the choice of the site. In these circumstances the House of Lords decided that the statutory authority conferred on the Board was in the nature of a power. The most important judgment is that of

[4] Cf. Salmond, *Law of Torts*, sect. 129.

[5] In *Carpenter* v. *Finsbury B.C.*, [1920] 3 K.B. 195, damages were awarded to the widow of a van-driver who was killed when driving through an unknown street owing to insufficient lighting by the defendants, in breach of their statutory duty.

[6] [1944] 2 A.E.R. 149.

[7] [1881] 6 A.C. 193.

[8] [1941] A.C. 74.

Lord Watson, which deduces from the permissive character of the terms (as regards the choice of the site, etc.) that the Legislature intended the discretion to be excercised in strict conformity with private rights, including liability for nuisance. The latter deduction, as will be shown, must be accepted with some reservations; but the importance of not construing a statutory duty towards the public where a power, with the necessary amount of discretion, is intended, has been emphasised again in recent cases. In *East Suffolk Rivers Catchment Board* v. *Kent*[9] the House of Lords was concerned with the Land Drainage Act, 1930, which provides that Drainage Boards "shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties as are conferred or imposed on drainage boards by this Act." Among the powers conferred by the Act is the power to repair any water course, drainage work, walls or banks. The exercise of this power is supervised by the superior administrative authority, in this case the Minister of Agriculture, who, under sect. 12, upon a complaint by any of the participating public authorities, such as a county council, regarding the failure of the Board to exercise its powers, has the power and the duty to give proper directions. The Drainage Act, 1930, avoids the language of an earlier Act of 1825, under which the Commissioners were *required* to maintain and keep in repair all such drains as they . . . should think proper or necessary. . . ." The Court of Appeal, in *Boynton* v. *Ancholme Drainage Commissioners*[10] deduced from that clause a liability for damages in regard to any particular drain which they had decided to make. This decision was not cited at all in the *East Suffolk* case.

In the latter, the facts were as follows:—

A strong spring flood tide had caused the wall which protected the plaintiff's land from inundation to collapse, and salt water poured through a wide breach. The defendants, in the exercise of their statutory power, attempted to repair the breach, but did so with inadequate means and an insufficient number of men. As a result, the gap was closed after 164 days, whereas, with the excercise of reasonable skill, it would have been closed, and the flood arrested, in 14 days. The plaintiff claimed damages for the injury caused to his land in the interval between the time the repair ought reasonably to have taken and the time it actually took. On the other hand, it was undisputed that the action of the Board had not caused any damage greater than that which would have occured had it not acted at all.

The House was unanimous that the Board had, under the statute, full discretion as towards the public whether to act at all, but Lord Atkin dissented on the question of the liability of the *Catchment Board* once it had taken action, (see below, p.39). In *Bank View Mills* v. *Nelson Corporation*[11] another attempt was made by the plaintiff to convert a statutory power into a common law duty. The defendant, a Board constituted

[9] [1941] A.C. 74.
[10] [1921] 2 K.B. 213.
[11] [1943] K.B. 337.

under the Nelson Local Board Act, 1879, had power to remove weirs and other obstructions to the free flow of water. In the exercise of various statutory powers, the Corporation constructed sewers, overflow pipes and other drains. The flooding of the plaintiff's property was caused by another weir, in private ownership. The plaintiff contended that the Board had a power coupled with an interest and was also the occupier of the bed of the stream, and that it was therefore liable for nuisance caused by the state of the stream. Although the Court of Appeal implied that, if possession and occupation of the bed were proved, a common law duty independent of the statute could be construed, it firmly refused to convert the statutory power into a duty towards private persons. "It would be a serious deterrent to a local authority to use statutory powers if it were told that it could only do so on pain of coming under an obligation to do something else in respect of which the legislature had deliberately refrained from imposing any duty on it" (per Lord Greene, M.R.)

On this point, at least, the position is thus fairly clear. Unless the statute imposes upon a public authority a clear duty designed to protect a class of persons (such as a duty to light streets), the Courts firmly refuse to fetter the administrative discretion of the authority and to interfere with the proper constitutional process of administrative supervision by the higher executive authority, through a conversion of the statutory power into a statutory duty. This leaves, however, the tricky question of a common law duty independent of the statutory power.[12]

II. Absolute and Conditional Authority

Lord Watson, in *Hill's* case (above p. 34), established the proposition that, where a statutory power was permissive not imperative, the inference was that it was conferred subject to the ordinary liabilities in common law, such as nuisance. The proposition, which is generally accepted, is thus formulated by Salmond[13]:—

> "Where the authority is imperative, and not merely permissive, it is necessarily absolute—that is to say when the statute not merely authorises but also directs a thing to be done, then it may be done regardless of any nuisance that flows from it. An authority which is merely permissive, on the other hand, is *prima facie* conditional only; for the Legislature will not be deemed, in the absence of special reasons for so holding, to have intended to take away the rights of private persons without compensation."

Since Hill's case, the practice of conferring upon local authorities or public authorities statutory powers, under ministerial supervision, has greatly increased. It represents one aspect of the growth of the service state. This practice of coupling a statutory power (as towards the public) with an administrative duty under the control of the

[12] Below, p. 37 *et seq.*
[13] 9th ed., sect. 11.

Executive, considerably affects the validity of Lord Watson's inference. The erection of air-raid shelters, for example, has been entrusted to local authorities in the form of a statutory power.[14] It is hardly imaginable that a member of the public, a resident or a hotelkeeper in the neighbourhood, would succeed in an action for nuisance, caused by the erection of an air-raid shelter, in circumstances similar, for example, to those of *Andreae* v. *Selfridge*,[15] where pneumatic drilling at night, in the course of the enlargement of business premises, caused disturbance to residents. There does not appear to be any direct authority on the subject; the matter seems self-evident. Indirect confirmation can be found in the recent case of *Oakes* v. *Minister of War Transport*,[16] where the plaintiff was injured by a projecting tank trap constructed under a statutory power. Singleton, J., said that in the present case, as distinct, for example, from *Hill's* case, the authority to construct the obstruction had been conferred in the interest of public safety. In such cases it might be necessary to do works which were bound to result in some risk to someone. The learned judge held that there was no negligence and did not even discuss the question of nuisance or any other tort.

I would suggest that, in the light of these developments, Lord Watson's rule—which, by itself, is only a dictum and couched in tentative, not absolute, terms—needs restating. Whether the statutory authority is imperative, that is "not merely authorises but also directs a thing to be done" (Salmond, l.c.), or, on the other hand, is merely permissive, that is, confers a power without a command, can no longer be regarded as the decisive test. The decisive test is whether the authorised act is of such public importance that it must be deemed to override private interests. This is clearly the case where defence and security measures are in question, such as air-raid shelters, tank traps, etc. On the other hand, in the cases of enterprises of a predominantly economic character, such as public utilities, whether run by a public authority or a private company, statutory powers must be deemed to be conferred subject to all private rights and liabilities, unless otherwise stated. Usually the terms are laid down, as in *Northwestern Utilities* v. *London Guarantee Co.*,[17] where a public utility company was the gas supplier. In other words, the social object of the power, not the status of the party or the form in which the power is conferred must be the decisive test.[18] This is a principle consonant both with the rule of law and the evolution of public policy. Where

[14] Civil Defence Act, 1939, sect. 9.
[15] [1937] 3 A.E.R. 255 (C.A.).
[16] (1944), 60 T.L.R. 319.
[17] [1936] A.C. 108.
[18] It is interesting to note that this distinction has, after a long evolution, come to be a test for the division of jurisdiction between administrative and ordinary courts in France. What matters is whether the contract or any other action undertaken by a public authority has, "for its direct object, the organisation or function of a public service." (Berthélémy, *Traité de Droit Administratif*, 10th ed., p. 963). In that case only, disputes come before administrative tribunals. In so far as public authorities enter into ordinary private contracts, of supply, services, etc., they are subject to ordinary jurisdiction.

a public authority engages in the supply of commodities, a business undertaking capable of being run on a profit and loss basis, it must be deemed to do so on equal terms with any private enterprise, and without prejudice to private rights. Where it acts as the guardian and constitutional representative of public interests, the opposite inference applies.

The scope of public interests and the proper activities of public authority varies, however, with public policy. There is to-day a considerable sphere of activities which are not as clearly the realm of public duty as the building of an air-raid shelter, or as clearly businesslike as an electricity works. In regard to these, it is particularly desirable that the conditions of the statutory power conferred upon a public authority should be clearly stated. The conception of the state and of the proper sphere of social services is in a constant state of evolution. The provision of a comprehensive system of schools of all types, or of a general health service, is to-day increasingly regarded as the legitimate sphere and duty of public authority.[19] It is doubtful whether *Hill's* case would be decided in the same way to-day as sixty years ago.[20] In any case, its authority is confined to a border line case, where the public authority seemed to have considerable choice as to the site of the hospital. The choice of a site or other conditions of construction is, of course, always governed by the rule, to be discussed below, that any statutory power must be exercised in a reasonable manner and that no statutory authority of any kind exempts from the duty to avoid unnecessary damage and interference. Where this condition is fulfilled, it is very doubtful whether English Courts would, at present, regard the building of health centres, schools, community centres, etc., as subject to nuisance and other civil liability, although the statutory authority be conferred in a permissive form.

III. Statutory Authority and Common Law Duties

Lord Blackburn, in *Geddis* v. *Proprietors of Bann Reservoir*,[21] laid down, as "thoroughly well established," the proposition: "That no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, negligence not to make such reasonable exercise of their powers." Theoretically, this proposition is undisputed

[19] Cf. the Education Act, 1944, and the White Paper on a General Health Service.

[20] For the evolution of public policy and social ideology in English case law, see the present author's *Legal Theory*, chaps. xxiii and xxv.

[21] [1878] 3 A.C. 430, 455.

and has been reaffirmed time and again.[22] No statutory authority provides shelter for carelessness, nor ought it to do so. But in the practical application of this principle, the recent cases dealing with street refuges, bomb craters and air-raid shelters have created havoc.

On the one hand, it is clear that, where an obstruction is caused in the road, or a dilapidated building causes injury to a member of the public, the responsible public authority is fully as liable as any other legal person. Thus, in *Penny* v. *Wimbledon U.D.C.*[23] the defendant council, though acting in the exercise of statutory powers, was held liable for the negligence of an independent contractor employed to repair a road, who had left a heap of soil unlighted at night. This was applied in the recent case of *Foster* v. *Gillingham Corporation*,[24] where the local authority had erected a barrier across the highway near a bomb crater. The hurricane lamps hung on this barrier had been extinguished by a strong wind, and, on the night when the plaintiff collided with the barrier and was injured, the attendant had failed to visit this place so that the lamps were not relit. The Court of Appeal considered the case a simple one. The defendant was negligent, and the Lighting (Restrictions) Order which exempts local authorities, during the war, from the duty of lighting the streets, did not authorise this negligence. Quite recently, the Court of Appeal has affirmed the liability, in negligence, of a Borough Council for the defective condition of an air-raid shelter used by the public.[24a] (The important question of the legal relationship between local authority and public, as users, need not be considered here.)

On the other hand, it is equally clearly established that where a discretion is given to a public authority to act or not to act, it is not liable in damages—though it may, of course, be responsible to the supervisory administrative authority—for not acting or stopping to act before completion of the work undertaken. As Scrutton, L.J., put it in *Sheppard* v. *Glossop Corporation*[25]:—

> "If they do light, they will be liable in damages for negligence in lighting; negligence in allowing gas or electricity to escape; negligence in putting posts in a highway without warning; and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do not light, or because they discontinue lighting, for dangers which they have not themselves created."

This has been clearly affirmed by the House of Lords, in *East Suffolk Rivers Catchment Board* v. *Kent*.[26] A Catchment Board, which had attempted to repair a breach in a wall constructed to prevent

[22] E.g. *Lagan Navigation Co.* v. *Lambeg Bleaching Co.* (1927), A.C. 226; *Manchester Corporation* v. *Farnsworth* [1930] A.C. 183.
[23] [1899] 2 Q.B. 72.
[24] [1942] 1 A.E.R. 306.
[24a] [1945] A.E.R. 135.
[25] [1921] 3 K.B. 132.
[26] [1941] A.C. 74.

flooding by a tidal river, but had done so with inadequate means and labour, and therefore prolonged the period of unrepair, was not held liable for the damage caused to a landowner by the delay in the repair, since the Board had a statutory power, but no obligation (as towards the public) to repair at all.[27] The majority of the House was emphatic on two points: Firstly, the proper discretion conferred by statute upon the Board would be vitiated if it were held liable for failure to render reasonably adequate and efficient service. As Lord Simon explained, the Board had its responsibilities over the whole area to consider, and it might well find that it was more important to use the available skilled staff on the repair of other breaches, or that the outlay involved in making a good job of one particular repair would exceed the funds at its disposal. Secondly, the position would be different if the Board, by its action, caused additional damage. By this, the majority understood damage greater than that which would have occurred if it had not acted at all (as it was entitled to). But Lord Atkin dissented. He considered as additional damage that caused by any excess of the period needed to stop the flood over that which would have been reasonable, given adequate and skilled execution of the work. It is obvious that this would indirectly compel the Board not to undertake any work unless it was able and determined to carry it out fully and with all due care. The result would presumably be that public authorities in such a position would rather err on the side of caution and make use of their discretion not to undertake work which might turn out to be complicated and costly.

While thus refusing to fetter the discretion implied in the nature of the statutory power, the House of Lords was unanimous in holding that where a public authority would, by its action, create an additional danger, e.g. by widening the breach or constructing a dangerous structure, it would certainly be liable. It is all the more difficult to understand a number of recent decisions by the Court of Appeal.[28]

In two substantially indentical cases, the Court of Appeal had to consider the claim for damages arising from the collision of a taxicab with an unlighted bollard on a street refuge.[29] The local authority had a duty to light under the Metropolis Management Act, 1855, but was relieved of that duty and indeed forbidden to comply with it, by the Lighting (Restrictions) Order, 1939. The same Order authorised, however, "lamps indicating obstructions upon or near the carriage way of the road," provided they did not exceed a specified candle power. In one of the cases such lamps had been placed on the refuge and officers appointed to look after them; but the lamps had gone

[27] The same decision had been reached by du Parcq, J., in *Smith* v. *Cawdle Fen Commissioners* (1938), 160 L.T. 61, where the Commissioners had built a wall too low to keep flood water from the plaintiff's land. On the opposite decision in *Boynton's* case, see above, p. 34.

[28] For a discussion of some of the following cases, see Matson, 5 MOD. L. R., p. 249.

[29] *Greenwood* v. *Central Service, Ltd.* (*St. Marylebone B.C.* third party), [1940] 3 A.E.R. 389. *Wodehouse* v. *Levy* (*St. Marylebone B.C.* third party), [1940] 2 K.B. 561.

out and had not yet been replaced. The Court held, in both cases, that the authority to light obstructions was permissive not imperative, that the former duty to light had been suspended by the 1939 Order and that there was no further obligation laid upon the local authority. In the earlier case, MacKinnon, L.J. said that "there would remain a Common Law obligation upon the respondents having erected an obstruction on the highway, to use reasonable care to prevent that obstruction from being a danger to persons using the highway." This is fully in accordance with a number of decisions to be discussed below, but MacKinnon, L.J. repudiated his dictum in the second of these two cases.

In *Lyus* v. *Stepney, B. C.*,[30] the problem was very similar, but the cause of the damage was a sandbin, not a bollard. It was proved that the defendant Council had painted or lit sandbins in the more important streets, but, at the time of the accident, a few weeks after the restrictions had come into force, had not yet lit those in the minor streets. It is important to note that, in all three cases, the Court held that, even if there was a duty to use reasonable care to prevent danger to persons using the highway, the Council had not, in fact, been negligent, in view of the short time elapsed since the new regulations, and the multitude of responsibilities laid upon the local authorities.

The difference between the above cases and *Fox* v. *Newcastle-upon-Tyne City Council*[31] was that, in the latter case, the cause of the injury to a cyclist, an air-raid shelter, had been erected after the outbreak of war and the coming into force of the legal restrictions quoted above. Once again, the authority to provide shelters was conferred by the Civil Defence Act, 1939, in the form of a power not of a statutory duty. The majority of the Court of Appeal held again that the Lighting Order, 1939, fully protected the absence of obstruction lights or other warning signs on the shelter. But du Parcq, L.J., in an important dissenting judgment, thought differently. Two points should be distinguished in his argument. The first is that the authority to provide air-raid shelters was conferred in the permissive form ("may provide . . .") and must therefore be read to infer "that the legislature means the undertakers to exercise their authority with reasonable care and not without it." This argument suffers from two weaknesses: firstly, the duty to use a statutory power reasonably and with care is not confined to permissive authority, but applies to all statutory powers, absolute or conditional, imperative or permissive.[32] Secondly, it has been pointed out above that the value of Lord Watson's dictum as to the difference between permissive and imperative powers is now very questionable. The permissive form in which even the most important powers are now usually conferred, has nothing to do with the public interests at stake and should not, therefore, serve as a test for the extent of civil liabilities. It is the second point in the

[30] [1941] 1 K.B. 134.
[31] [1941] 2 K.B. 120.
[32] Above, p. 37.

judgment of du Parcq, L.J. which deserves attention. The construction of an air-raid shelter, unpainted and unlighted, he said, was no different from leaving a heap of stones in a road. It was an obstruction causing a danger to the public and in the nature of a trap. Since the shelter was built, after the Lighting (Restrictions) Order had come into force, the position was different from that in *Greenwood's*, *Levy's* and *Lyus'* cases.

In this contention, du Parcq, L.J. has the clear support of the House of Lords in the *East Suffolk Catchment Board's* case (unfortunately this decision is never referred to in the blackout cases) which contrasted the case under judgment with a situation where the Board would have created a new danger or trap. Several decisions of the Court of Appeal itself are also on his side. *Foster* v. *Gillingham Corporation*[33] has already been quoted. It is certainly difficult to understand why a local authority should be liable for damage caused by a bomb crater whose obstruction lamps the wind had extinguished, but not liable for damage caused by a street bollard whose lights had also been extinguished. On the same lines as *Foster's* case are *Polkinghorn* v. *Lambeth B. C.*,[34] where a refuge light failed for unexplained reasons and the Council was held liable in negligence, and two decisions of the Court of Appeal from the last war. In *Morrison* v. *Lord Mayor of Sheffield*,[35] the defendants, acting with statutory authority under the Public Health Act Amendment Act, 1890, had planted trees in highways and surrounded them with iron spike guards. Owing to the lighting restrictions imposed during the last war, the plaintiff, crossing at night, ran into some spikes and was severely injured. Reading, C.J., and Pickford, L.J., agreed that there was a duty upon the local authority to take reasonable care that what they had put in the roadway should not become a nuisance and a danger under altered conditions. Both cast doubt upon the decision of the jury that there had, in the circumstances, been lack of care, but were bound by the verdict of the jury on a question of fact.

The second decision, *Baldock* v. *Westminster City Council*,[36] contains a more limited proposition. The local authority, relieved of its lighting duties by war-time restrictions, continued to light street refuges with red lamps; but these electric lights became very erratic owing to irregularities in the electric pressure. The plaintiff's taxicab drove into the refuge while the lights did not burn. In these circumstances, the jury found that there was negligence, and the Court, though clearly indicating its doubts, did not think it possible to disturb the verdict. Bankes, L.J., left it open whether it would have been competent for the local authority to extinguish all shelter lights, but held that, having decided to continue lighting the shelters, it had a self-imposed duty in regard to the particular lamps on the particular shelters not

[33] [1942] 1 A.E.R. 304.
[34] (1938), 158 L.T. 127.
[35] [1917] 2 K.B. 866.
[36] 120 L.T. 470 (1918).

to lay a trap for the public, by inviting it to believe that the shelters were lighted.

In *Lyus'* case, the Court was referred to *Morrison's* case and seemed to acknowledge the discrepancy of views, but the majority supported itself by the higher authority of *Great Central Railway Co.* v. *Hewlett.*[37] In that case, a railway company had obtained statutory permission to maintain posts and gates at a place where they would otherwise have constituted a nuisance. During the war-time lighting restrictions a taxicab ran into these posts which were practically invisible. The decision was in favour of the defendants; but it is strange that the Court, in *Lyus'* case, should have quoted this decision in support. The vital difference between the two cases is that, in *Hewlett's* case, the railway company was not the lighting authority. "The case is one in which one party lawfully maintains in a highway something which is capable of becoming dangerous to the public unless another party takes steps to avert that danger. . . . I think that the decisions on the liability of those who maintain a structure adjoining a highway which becomes dangerous to those who use it are not now in point" (per Lord Sumner).

There is thus a definite split of authority. Hilbery, J., in *Knight* v. *Sheffield Corporation*[38] had therefore not much difficulty in choosing according to preference. In a case where a member of the public, entering an air-raid shelter during a raid, fell into an unlighted hole in the highway, from which access to the stairs was gained and which was normally, but not at that moment, covered by a flap, he awarded damages, following the line of decisions from *Morrison's* to *Foster's* case.

Almost every consideration of legal principle and of justice is in favour of this latter group and against the group of blackout decisions, from *Greenwood's* to *Fox's* case, which has been discussed above. Firstly, a distinction has constantly been made by English Courts between the statutory power or duty on the one hand and the common law duty on the other hand. It is, by implication, denied in these decisions here. The relation between these two types of legal duties will be considered further in the following section. Secondly, the conception of a general duty of care, owed by those who are responsible for a structure, factory, institution, etc., to the public, has been consistently strengthened, notably since *Donoghue* v. *Stevenson.*[39] Manufacturers (*Donoghue's* case, *Grant* v. *Australian Knitting Mills,*[40] occupiers of houses (*Wilchick* v. *Marks*, *Heap* v. *Ind, Coope and Allsopp,*[41] *Haseldine* v. *Daw*),[42] repairers of cars (*Herschtal* v. *Stewart and Ardern*),[43] are held liable for defects dangerous to the public. Liability for

[37] [1916] 2 A.C. 511.
[38] [1942] 2 A.E.R. 411.
[39] [1932] A.C. 562.
[40] [1936] A.C. 85.
[41] [1934] 2 K.B. 56; (1940) 3 A.E.R. 634.
[42] [1941] 2 K.B. 343.
[43] [1940] K.B. 155.

concealed traps has been extended considerably, and local authorities, as providers of public parks, have felt the rigour of the law. They have been held liable for exhibiting poisonous red berries attractive to children (*Glasgow Corporation* v. *Taylor*)[44] for a broken bottle in a paddling pool though the injured visitor was only a licensee and its existence unknown (*Ellis* v. *Fulham B. C.*)[45], and, quite recently, for the condition of an air-raid shelter which caused persons to slip, with fatal results (*Baker* v. *Mayor of Bethnal Green*)[46]. Neither the Courts nor the public are likely to advocate any relaxation of legal duties and liabilities in favour of public authorities. The explanation of the decisions from *Greenwood's* to *Fox's* case must be sought in two other factors. Du Parcq, L.J., in his dissenting judgment in *Lyus'* case, stressed the differences between shelters erected before and after the statutory restrictions. Mackinnon, L.J., on the other hand, deprecated such a distinction. Any legal solution incomprehensible to the law-seeking public and to common sense must be viewed with suspicion. If Citizen A runs into air-raid shelter X built in August, 1939, and Citizen B into air-raid shelter Y built in October, 1939, both being unlighted and unpainted, A would, according to the view of du Parcq, L.J.,[47] recover, but B would not. Even as the law stands now, a person may recover if he falls into an unprotected bomb crater, but not if he runs into an unprotected street refuge. The clear and fair solution would certainly be to recognise, in accordance with a much longer established line of decisions, a general duty of care to avoid dangers to the public, which arise from constructions on the highway, whatever the time at which the structure was erected. The decisions of the House of Lords, though none is directly in point, and an impressive array of decisions by the Court of Appeal (discussed above) certainly support this principle. *Hewlett's* case, as pointed out, does not touch this question at all, and the *East Suffolk Catchment Board* case affirms liability where a new danger is created. A new danger can be created by the change of conditions as much as by positive action, and it is only a lingering of the discredited distinction between misfeasance and non-feasance which could stand in the way of such a conception. The archaic distinction between misfeasance and non-feasance as regards liability of highway authorities for non-repair of roads is still not entirely given up. But any danger arising from an artificial structure erected or other work done in the highway has always been considered as misfeasance.[48] In *McLelland* v. *Manchester Corporation*,[49] the defendants were held liable for taking over and opening to the public a road which they had paved and otherwise made up, but left with an open ravine at the end of it. "You cannot

[44] [1922] 1 A.C. 44.
[45] [1938] 1 K.B. 212.
[46] [1945] 1 A.E.R. 135 (C.A.).
[47] Supported by Matson, l.c. and by Dr. Stallybrass, in the forthcoming 10th edition of *Salmond on Torts*.
[48] Salmond, sect. 76.
[49] [1912] 1 K.B. 118.

sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done" (per Lush, J).

By far the most weighty consideration in favour of the decisions criticised here is the danger of a flood of actions against local authorities overburdened with responsibilities. But it seems with respect that the Court of Appeal could have chosen a better method to protect them. The proper and more consistent way to discourage such a flood of litigation is the interpretation of the proper standard of care and reasonableness in the light of the prevailing conditions. In practically every one of the wartime cases a subsidiary ground for the decision was that negligence was not proved. The contrary decisions from the last war, such as *Baldock's* and *Morrison's* cases, were based on jury verdicts which the Court obviously thought wrong but did not see its way to disturb. Now that these cases are no longer decided by juries —apt to favour the individual against a private or public corporate body—the danger of Courts minimising the difficulties of local authorities is very small, to judge by all recent cases. A subsidiary ground for the decision was that negligence had not, in fact, been proved. It would be obviously wrong not to consider the interval between the Order and the accident, the shortage of material, of labour, the size of the area, the priority of more urgent responsibilities, and other circumstances, in deciding the question of negligence. The House of Lords chose the same method when it affirmed the admissibility of the defence of contributory negligence against a breach of statutory duties, but imposed a rigid test in determining the standard of care to be expected of a mineworker at the end of an underground shift.[50] Here the same method would seem fully sufficient to stem irresponsible actions; and it would avoid the confusion created by the contradictory decisions of the Court of Appeal.

IV. Distinction Between Statutory and Common Law Duties

The distinction between, on the one hand, a statutory power or duty to do or to omit certain things, and, on the other hand, a general common law duty to take care not to harm the public by dangerous structures assumes that the one and the other exist independently of each other. It was on this co-existence of two types of duties and relations, that arising from statute and that arising from common law, that Lord Atkin based his dissenting judgment in the *East Suffolk Catchment Board* case. As a general proposition, this contention cannot be challenged. *Donoghue* v. *Stevenson* laid the foundations for a general duty of care by those in control of property or undertakings towards the public, and the Courts have since consistently assumed the existence of such a duty independently of any statutory duty. Thus,

[50] *Caswell* v. *Powell Duffryn* [1939] A.C. 215.

in *Read* v. *Croydon Corporation*[51], the circle of persons protected by the common law duty not to allow impure water to be consumed was held to be wider than the circle of persons protected by the statutory obligation of the local authority. In *Wilkinson* v. *Rea*[52] Luxmoore, L.J., gave the breach of a common law duty as a concurrent ground to the breach of a statutory duty for the liability of shipowners for the negligence of contractors who had left a hatch open. Following the wide interpretation of "neighbour" in *Donoghue's* case, the circle of persons protected by the common law duty is usually wider than that protected by the statutory duty. For it comprises all those who, in the ordinary course of events, can reasonably be expected to be affected by the dangerous condition created or tolerated by the defendant. It is all the more surprising to find Macnaghten, J., in *Fisher* v. *Ruislip-Northwood U.D.C.*,[53] dismissing an action by a car driver who had collided with an unlit shelter in an unknown district, for the reason that he was a stranger and therefore did not know which shelter he could expect to be lit or otherwise. This is not only in direct contradiction to *Carpenter* v. *Finsbury B.C.* (above p. 33) but also contrary to the whole modern conception of a duty of care towards the public. Since car-driving is, even in war-time, not restricted to one particular borough or warden's area, the non-resident is, if anything, in greater need of protection than the resident against traps on the highways. As a general proposition, the co-existence of these two types of relations does not appear to have been doubted. Yet, it is submitted, the majority of the House of Lords rightly rejected Lord Atkin's argument in the case before them. For Lord Atkin's view would have meant the effective curtailment of the administrative discretion of the Board. The majority interpreted this discretion, as expressed in the Act, as including the power to start work with limited resources, in the hope of achieving something, but to abandon it if it turned out to be too difficult or costly, subject always to supervision by the Minister, which can be set in motion by the right of the interested local authorities to appeal to him, and also subject to the liability for any fresh damage which their action might inflict. Lord Atkin, on the other hand, likened the Catchment Board to a private building contractor who, once having undertaken a job, was under an obligation to complete it with all due care and skill. The same view had been taken, though on the basis of a differently worded statute, by the Court of Appeal in *Boynton* v. *Ancholme Drainage Commissioners*,[54] a case which was not once referred to, by either counsel or Court, in the *East Suffolk Catchment Board* case. The vital defect of this view is that it puts a public authority, appointed to do a job in the interest of the community, with many interests to be weighed, and deriving its funds from parliamentary allocation, on the

[51] 55 T.L.R. 212
[52] [1941] 1 K.B. 668 (C.A.).
[53] [1944] 2 A.E.R. 149.
[54] [1921] 2 K.B. 213.

same level as a private contractor, running a business and working for profit. Only by taking this view, was it possible for Lord Atkin to consider as additional damage the injury caused during the interval between the time it actually took the Board to repair the breach, and the time it ought to have taken a skilled operator to repair it. And it was on opposite considerations of public policy that the judgments of the Lord Chancellor, of du Parcq, L.J., in the lower Court, and of Lord Greene, M.R., in *Bank View Mills* v. *Nelson Corporation*,[55] were primarily based. They saw that the view taken by Lord Atkin might well lead to an interference with the proper initiative and administrative responsibility of a public authority which is primarily responsible to Ministers and Parliament. To that extent, the common law duty is mitigated by a proper interpretation of the statutory power.

The same considerations do not, however, apply to the liability of a local authority for structures dangerous to the public. It has already been pointed out that its different responsibilities and priorities must be taken into account in determining the standard of care to be expected. But there is no reason, either of legal principle or of public policy, why the power or duty to observe the blackout regulations should exclude the general duty to avoid dangers for the public. It is significant that du Parcq, L.J., who, both in the *East Suffolk Catchment Board* case and in the earlier case of *Smith* v. *Cawdle Fen Commissioners*,[56] stressed the special character of the responsibilities of a public authority and the corresponding restriction of civil liability, held the local authority liable, in principle, for the danger it had created through building an unpainted and unlighted shelter in *Lyus'* case.[57]

The general independence of statutory and common law duty must thus always be subject to the terms and intention of the statute in question. And the interpretation of the statute must include its avowed social objective.[58]

V. Summary of Legal Position

Insofar as the confused state of the authorities permits, the conclusions reached may be summarised as follows:

1. The normal way of entrusting a social function to a public authority is now increasingly the granting of statutory powers. The imperative or permissive form is therefore no reliable test to decide whether authority is conferred subject to civil liabilities—other than negligence—or not. The proper test, for which there is tentative authority, is whether the power is conferred for the exercise of a public function in the general interest, or for an undertaking of a primarily competitive and economic enterprise.

2. No statutory authority of any kind authorises negligence in the manner of its exercise. (Principle of *Geddis'* case).

[55] [1943] K.B. 341.
[56] 160 L.T. 61.
[57] Above, p. 40.
[58] On this question, see Allen, *Law in the Making*, 3rd ed., p. 405 *et seq.*, p. 415 *et seq.*; Friedmann, *Legal Theory*, pp. 258–262.

3. A common law duty exists, in principle, independently of the statutory power or duty conferred or imposed on a public authority. But the decision of the House of Lords in the *East Suffolk Catchment Board* case implies that, where a common law liability would frustrate the object of the statutory authority, it must be ignored.

4. In the absence of a directly relevant decision of the House of Lords, the decisions of the Court of Appeal are in sharp conflict as to how far a statutory relaxation of duties, such as that authorized by the War Regulations mitigating the duty to light the streets, implies an abandonment of the duty to avoid traps for the public. The better view is that it does not affect such duty; but the standard of care must be measured with regard to the manifold responsibilities of a local authority, especially in time of war. The decision of the House of Lords in the *East Suffolk Catchment Board* case supports this view, although it is no direct authority on this point. Insofar as a common law duty exists, it protects all those who can reasonably and in the normal course of events be expected to come to grief by the neglect of the duty. The contrary decision in *Fisher* v. *Ruislip-Northwood U.D.C.*[59] is incompatible with well established authority.

VI. Some General Observations

The problems and decisions discussed in this article come under the law of tort, and, insofar as they are treated at all, are dealt with in textbooks on that subject. Yet, they belong in truth to a subject whose systematic recognition and classification in the English system cannot be much longer delayed without grave consquences: Administrative law. Dicey's celebrated but unfortunate definition of the rule of law is now mainly a matter of history. But the vast mass of material supplied by the growing number of ministerial and quasi-judicial administrative powers, of special tribunals, of the growing number of contractual, quasi-contractual and delictual relations between public authorities and private persons still lacks comprehensive consideration and adequate diagnosis, although valuable beginnings have been made.[60] In continental systems, all of which recognise such a system, administrative law comprises all these relations between public authorities and private citizens, although the demarcation of the border-line between a public authority acting as such and acting on a private law basis has everywhere presented great difficulties.[61] In France, the object of the specific act in question has been adopted as the test; in Germany—prior to the Nazi regime,

[59] Above, p. 45.

[60] Cf. among others, Robson, *Justice and Administrative Law* (1928); Jennings, *Principles of Local Government Law* (1939); Allen, *Bureaucracy Triumphant*; *Committee on Minister's Powers* (1932).

[61] Cf. Jellinek, *Verwaltungsrecht*, 2nd ed., p. 45 *et seq.* The whole distinction between private law and public law has been opposed by some continental jurists, notably Kelsen, who advocates a rule of law for all alike much more absolute than Dicey and deprecates any special legal position of administrative authorities, and by Duguit, who only recognises public law a rule of subordination binding on all. Cf. Friedmann, *Legal Theory*, p. 105 *et seq.*, p. 160.

whose conception of law made the whole notion of administrative law irrelevant—no uniform test had come to be generally accepted. The tendency was, on the whole, to let the character of the relationship decide. Where a public authority acted by virtue of its official authority and power of command, the relation was generally considered as one of administrative law; otherwise as one of private law.

In the great majority of cases no difficulty arises. The main practical importance of this question in continental systems lies in the fact that it determines—subject to certain exceptions—the question of jurisdiction. Public law matters come before administrative courts, other matters before the ordinary courts.[62]

It is not suggested that the introduction of a comprehensive system of administrative Courts into English law is necessary;[63] this is a question too complex to be considered here. What is, however, indispensable, for urgent practical reasons, is the recognition of public law problems as such.

The basic problem of all administrative law in continental systems is the proper definition of the limits of the discretion which all public authorities must be allowed for the proper fulfilment of their public functions without sanctioning unlawful interference with the integrity of life, liberty and property. The same problem has become apparent in the discussion of the English cases analysed in this article. It has also shown that English judges recognise to an increasing extent the special problems involved in the clash of administrative discretion and private interests. Some decisions have, in fact, gone rather too far in granting immunity to public authorities from liabilities from which they ought not to be immune. The main difficulty is the haphazard and casual treatment of problems of administrative law. This is inevitable as long as they are embedded in categories of private law and can be taken out of them only with the help of occasional observations of public policy. Eventually, it seems inevitable that either concepts of Common Law must be so widened as to be able to cope with the rapidly growing field of legal relations arising out of social service functions, or that a vast number of legal relationships will develop into a separate system of administrative law.

[62] The Weimar Constitution specifically exempted salary claims of officials and compensation claims for expropriation in the public interest from administrative jurisdiction and reserved them to the ordinary Courts.

[63] As suggested by Taborsky, 7 Mod. L. R., p. 209.

APPENDIX

SYNOPSIS OF PRINCIPAL CASES

1. *Nature of Statutory Power.*

(*a*) All statutory powers must be exercised reasonably, without negligence.	=	*Geddis* v. *Proprietors of Bann Reservoir*, [1878] 3 A.C. 430. *Baker* v. *Mayor of Bethnal Green*, [1945] 1 A.E.R.. 135 (C.A.) (defective air-raid shelter).

(*b*) Statutory authority does not exempt from other tortious liability where interference with private rights is not inevitable.		*Metropolitan Asylum District* v. *Hill*, [1881] 6 A.C. 193 (smallpox hospital—nuisance).
(*c*) A public authority which exercises a discretionary power is not liable for the manner of its exercise provided it does not inflict damage greater than would arise from inaction.		*East Suffolk River Catchment Board*, v. *Kent* [1941] A.C. 74 (Catchment Board—repair of flood wall).

2. *Influence of Statutory Authority on Common Law Duty.*

(*a*) Statutory Authority protects Local Authority from common law liability for dangers to public.	C.A.	*Greenwood* v. *Central Service, Ltd.*, [1940] 3 A.E.R. 389 (collision with street refuge). *Wodehouse* v. *Levy*, [1940] 2 K.B. 561 (same facts). *Lyus* v. *Stepney B.C.*, [1941] 1 K.B. 134 (collision with sand bin). In the last three cases the structure had been erected prior to the statutory lighting relaxation. *Fox* v. *Newcastle-upon-Tyne*, [1941] 2 K.B. 120 (collision with air-raid shelter erected after statutory lighting relaxation). *Fisher* v. *Ruislip-Northwood U.D.C.*, [1944] 2 A.E.R. 149. (car colliding with unlit shelter in unknown district). *Penny* v. *Wimbledon U.C.*, [1899] 2 Q.B. 72 (heap of soil left unlit on road).
(*b*) Statutory Authority does not protect Local Authority from common law liability for danger to public.	C.A.	*Morrison* v. *Lord Mayor of Sheffield*, [1917] 2 K.B. 866 (spikes round tree injuring pedestrian in darkness). *Baldock* v. *Westminster City* (120, L.T. 470) (injury through unlit shelter which local authority had decided to keep lighted under wartime restrictions). *Polkinghorn* v. *Lambeth B.C.* (158, L.T. 127) (refuge light failed for unexplained reasons). *Foster* v. *Gillingham Corporation*, [1942] 1 A.E.R. 306 (hurricane lamp on highway barrier near bomb crater extinguished by wind). *Knight* v. *Sheffield Corporation*, [1942] 2 A.E.R. 411 (unlighted hole in highway leading to air-raid shelter).

W. FRIEDMANN

THE DIPLOMATIC PRIVILEGES (EXTENSION) ACT, 1944

IT is proposed to survey in this article the positive provisions of the Diplomatic Privileges (Extension) Act, 1944, which deals with International Conferences (I), Allied Governments and Authorities (II), and International Organisations (III). The provisions relating to international organisations are the most important part of the statute; in treating the legal position of international organisations, we shall describe their privileges, immunities and capacities under the new Act (A), dealing separately with the immunities, privileges and capacities of the organisation (1), and the immunities and privileges of officers and government representatives (2). We shall then proceed to survey the privileges and immunities of international organisations and their officers under other enactments, and extra-statutory concessions, granted to them (B), and finally add some remarks on problems involved in the immunity of international organisations in general (C).

I. International Conferences

The statute contains three different sets of provisions. Only one of them introduces a permanent alteration of the law: Section 3, which deals with the diplomatic immunities of representatives attending international conferences. Where a conference, attended by the representatives of the United Kingdom Government and of at least one foreign sovereign Power, is held in the United Kingdom, the Secretary of State may remove doubts about the diplomatic immunities of the foreign representatives and their official staff by compiling a list of the persons who are entitled to such immunities and publishing it in the Gazettes. Every representative of a foreign Power who is for the time being included in the list, shall, for the purpose of any enactment and rule of law or custom relating to immunities, be treated as if he were a foreign envoy, accredited to His Majesty, or a member of the retinue of such an envoy, as the case may be. The Gazette affords conclusive evidence of the diplomatic status, or otherwise, of the person in question.

II. Allied Governments and Authorities

Section 5 introduces an amendment of the Diplomatic Privileges (Extension) Act of 1941. Under the statute of 1941 the immunities and privileges of an envoy of a foreign Power, accredited to His Majesty, and of his retinue, were extended to members and high officials of the governments of foreign powers or of provisional governments, if these governments were (1) allied with Britain and (2) established in the United Kingdom. Similar rights were given to members of any national committee or other foreign authority for the time being established in the United Kingdom and recognised as

competent to maintain armed forces for service in association with His Majesty's forces. What Section 5 of the Act of 1944 does, is to adapt this provision to the fact that some of the authorities and governments in question have, in the course of recent developments, transferred their seat wholly or partly to other countries, mostly their own. The new statute dispenses with the condition mentioned *supra sub* 2 (establishment of the government or authority in the United Kingdom). Where diplomatic privileges and immunities have been extended by the Act of 1941 to members of foreign governments and authorities, established in this country, and where, since this extension took effect, the government or authority ceased to be established or to be wholly established in the United Kingdom, the Act shall nevertheless continue to apply in relation to such members and officials of the government or authority as perform their functions wholly or partly in the United Kingdom. This amendment of the Act of 1941 has retrospective effect ("the Act shall . . . be deemed never to have ceased to apply") and, together with the principal Act it will continue in force so long as the Emergency Powers (Defence) Act, 1939, continues in force (Sect. 3 (2) of the 1941 Act).

III. International Organisations

(*A*) *The privileges, immunities and capacities under the Act of* 1944

Sections 1 and 2 deal with privileges, immunities and capacities of certain international organisations and their staffs and it was these that roused a certain amount of controversy when the Bill was discussed in the House of Commons[1] and led to a number of amendments of Section 1 of the Bill and to the adding of the Schedule. The provisions of this part of the Act will remain in force for the period of five years beginning with the date of the passing of the Act (17th November, 1944). Under a proviso to sub-section 6 the duration of this part of the Act can be extended by Order in Council for a further five years, but such Order in Council requires an affirmative resolution of Parliament ("an Address . . . praying that the said sections shall be continued in force for a further period not exceeding five years after the time at which they would otherwise expire").

Section 1 is an enabling measure. It can be applied by Order in Council to any organisation of which the United Kingdom Government is one of the members. The Act distinguishes between:

(*a*) the immunities and privileges of the *organisation* as such, which under the Orders in Council shall have the legal capacities of a body corporate (Sect. 1 (2)a and Part I of the Schedule).

(*b*) the immunities and privileges of high officers and government representatives (Sect. 1 (2)b and Part II of the Schedule).

(*c*) the immunities and privileges of other officers and servants (Sect. 1 (2)c and Part III of the Schedule).

[1] Hansard, House of Commons, Vol. 403, No. 121 (27th September, 1944), col. 349 *et seq.*; *ibid.* No. 132 (13th October, 1944) col. 2086 *et seq.*; *ibid.* No. 136 (20th October, 1944), col. 2770 *et seq.*; *ibid.* Vol. 404, No. 137 (24th October, 1944), col. 94 *et seq.*

(1) *The immunities and privileges of the organisation* (*supra* (*a*))

As has already been pointed out, the Act does not enumerate the international organisations which are to enjoy immunities and privileges but delegates the power to designate them to the Executive, the only condition stipulated being that only such international organisations can come under the Act as consist of the United Kingdom Government and at least one more government of a foreign sovereign Power.

The organisation which was foremost in the minds of both the government and the legislature when passing the law, was the United Nations Relief and Rehabilitation Administration, established by the Washington Agreement of 9th November, 1943.[2] But UNRRA is, of course, neither the first, nor the only organisation of this kind,[3] nor is the enabling provision an entire innovation in British municipal law. To give only one example: the Covenant of the League of Nations (Article 7 of the Peace Treaties) provides for the privileges and immunities of the League of Nations, its officials, and representatives of its members. Through the Treaty of Peace Acts of 1919, 1920, 1921 and 1924,[4] His Majesty was empowered, *inter alia*, to make such Orders in Council and do such things as appear to him necessary for carrying out the Treaties and for giving effect to any of their provisions. The International Labour Office as part of the organisation of the League of Nations (e.g., Art. 392 of the Treaty of Versailles) shares the immunities and privileges of the League. During the proceedings in the House of Commons the Inter-Governmental Committee on Refugees was mentioned as an organisation to which it will be possible to apply the Act by Order in Council.[5] The Draft Articles of Agreement of an International Monetary Fund (Article IX) and the Draft Articles of Agreement of an International Bank for Reconstruction and Development (Art. VII), contained in the Final Act of the United Nations Monetary and Financial Conference, Bretton Woods,[6] provide for privileges and immunities of these institutions and the same applies to the permanent Organisation on Food and

[2] Cmd. 6491.

[3] Dr. Jacques Secretan gives a detailed account of the international organisations which have been granted privileges and immunities for themselves and their officers in "The Independence granted to agents of the international community in their relations with national public authorities" in (16) British Year Book of International Law (1935) pp. 56 *et seq.* He distinguishes in this connection two groups of international agencies: (*a*) those connected with the preservation of peace, the settlement of disputes and the general social welfare, for instance, the League of Nations, the Permanent Court of International Justice, the International Labour Office, the International Central American Tribunal, the Central American Commission of Inquiry, the International Institute for Intellectual Co-operation, and (*b*) the many Commissions connected with the freedom of navigation on certain rivers.

[4] The Treaty of Peace Act, 1919; the Treaties of Peace (Austria and Bulgaria) Act, 1920; the Treaty of Peace (Hungary) Act, 1921; the Treaty of Peace (Turkey) Act, 1924.

[5] Statement by the Minister of State (Mr. Richard Law) in Hansard, H.C., Vol. 403, No. 132 (13th October, 1944), col. 2113.

[6] Cmd. 6546.

Agriculture envisaged at the Hot Springs Conference.[7] [7a] It goes without saying that the world security organisation "The United Nations" proposed in the Dumbarton Oaks proposals[8] will no doubt claim at least such privileges as the League of Nations has been enjoying.

Resolution No. 32 of the first session of the UNRRA Council, held at Atlantic City, New Jersey, November 10th to December 1st, 1943,[9] recommends, *inter alia*, that the member governments accord to the Administration facilities, privileges, immunities and exemptions which they accord to each other, including:

(*a*) immunity from suit and legal process except with the consent of, or insofar as is provided for in any contract entered into by or on behalf of, the Administration;

(*b*) inviolability of the premises and of the archives of the Administration;

(*c*) exemptions from taxation, including customs duties;

(*d*) exemptions from, or facilities in respect of, foreign exchange controls. (I (1).)

The resolution further recommends to member governments to take all the steps they may consider necessary to enable the Administration to exercise within its jurisdiction the powers conferred on it by Article I, paragraph 1, of the Agreement, which is to the effect that the Administration shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies and to review the activities of agencies so created, to manage undertakings and in general to perform any legal act appropriate to its objects and purposes. (I (2) of Resolution 32.)

In empowering the King in Council to grant to the organisation "the legal capacities of a body corporate" the Act enables the delegated legislation to comply with this recommendation.

Part I of the Schedule to the Act provides (paragraph 1) for immunity from suit and legal process. As the Schedule contains the maximum immunities which the Executive is empowered to grant to the organisation, the Order will be in a position to introduce into British law the restriction "except with the consent of, or insofar as is provided for in any contract entered into by or on behalf of, the Administration." This means that by the Order in Council it will be possible, as far as this Act applies, to dissipate any doubts that may

[7] Cmd. 6451; see also Mr. Richard Law, *ibid.* col. 2096.

[7a] After the present paper had gone to press the "Documents relating to the Food and Agriculture Organisation of the United Nations 1st August—14th December, 1944," Miscellaneous No. 4 (1945), Cmd. 6590, have been published. Articles XV and VIII of the Constitution of the Organisation which has been accepted by His Majesty's Government in the United Kingdom (Instrument of Acceptance at p. 10 *ibid.*) contain provisions regulating the immunities and privileges of this Organisation and its staff. See also the First Report by the Interim Commission on Food and Agriculture, *ibid.*, pp. 33 and 38. The Interim Commission on Food and Agriculture and the Organisation (FAO) is discussed in 38 *American Journal of International Law* (1944) at pp. 708 *et. seq.*

[8] Cmd. 6560.

[9] Cmd. 6497.

still exist in British law as to the possibility of the waiver of diplomatic privileges.[10] Moreover, it will be possible to provide by Order in Council that the Organisation may not only submit to British jurisdiction by express declaration and entering appearance, but that it may validly and enforceably submit to British jurisdiction and arbitration by contract made beforehand.

As to taxes and rates, Part I of the Schedule distinguishes between taxes on the importation of goods, and other taxes and rates. As to taxes and rates in general (paragraph 3 of Part I) the Organisation may be put on an equal footing with a foreign sovereign. As to import duties the exemption must be restricted to goods directly imported by the organisation either for its official use in the United Kingdom, or for exportation, with the proviso that such exemption must comply with any conditions prescribed by the Commissioners of Customs and Excise for the protection of the Revenue (paragraph 4).

2. *Immunities and privileges of officers and government representatives (supra (b) and (c))*

Resolution 32 I (3) of the first UNRRA conference claims for both representatives of member governments and officials and employees of the organisation a uniform standard of restricted privileges. They shall apply to the persons in question "when engaged on the business of the Administration" and shall consist, *inter alia*, in—

(*a*) immunity from legal process of any kind in respect of acts performed by them in their official capacity and falling within their function as such,

(*b*) immunity from taxation on official salaries, allowances or other emoluments as representatives, officials, or employees of the Administration,

(*c*) the same immunities from immigration restrictions, alien registration and military service obligations and the same facilities as regards exchange restrictions as are accorded to representatives, officials and employees of similar rank of other member governments.

The British statute, distinguishes between: I. high officers and government representatives on the one hand, and II. other officials and servants of the organisation on the other.

Ad I. To the former, if they are not British subjects, full diplomatic immunities and privileges in respect of (1) immunity from suit and legal process (2) inviolability of residence and (3) exemption or relief from taxes and rates, may be granted by Order in Council (Sect. 1 (2) b of the Act, Part II of the Schedule).

If they are British subjects from any part of the British Commonwealth and Empire outside the United Kingdom, e.g., representatives of Dominion governments on the governing body of the organisation, they may receive exemption or relief from taxes and rates to the

[10] In re *Republic of Bolivia Exploration Syndicate, Limited*, [1914] 1 Ch. 139, per Astbury, J; but see *Taylor* v. *Best* (1854), 14 C.B. 487; *Dickinson* v. *Del Solar*, [1930] 1 K.B. 377; and recently the decision of the Court of Criminal Appeal in *R.* v. *A.B.*, [1941] 1 K.B. 454.

same extent as an accredited foreign envoy. In other respects they are treated like the lesser officials of the organisation.

Ad II. Like them they may be granted:

(1) Immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties, and

(2) exemption from income-tax in respect of emoluments received as an officer or servant of the organisation. But the exemption from income-tax in respect of official salaries does not apply in the case of British subjects whose usual place of abode is in the United Kingdom (Sect. 1 (2) c, Proviso).

British subjects have therefore *privilegia odiosa* in two respects:

(1) British subjects cannot be granted entire exemption from suit and legal process and inviolability of residence even if they come under the category of high officers and government representatives. But they may, in such a case, be granted full diplomatic privileges in respect of rates and taxes, if they are nationals or citizens of, or belong to, any part of His Majesty's dominions outside the United Kingdom.

(2) No exemption from taxes or rates must be conferred on a British subject whose usual place of abode is in the United Kingdom.

The only immunity which British subjects from the United Kingdom may enjoy, is immunity from legal process in respect of the performance of their official duties on behalf of the organisation.

The partial exemption of British subjects from the benefits of the Act conforms with the Proviso of the Atlantic City Resolution No. 32 1 (3), which is to the effect that each member government shall determine to what extent the recommendations shall apply to its own nationals, and to non-nationals in permanent residence in its territories. The fact that the Act and its Schedules do not contain any restrictions on the granting of privileges to foreigners who are permanently resident in Britain does not, of course, prevent the Order in Council from restricting their privileges, the Schedule merely stating the maximum of privileges which may be granted and leaving it to the Executive to decide on the extent of the privileges to be granted within the framework of the Schedule.

The special provisions which take British subjects to a certain extent out of the general provisons of the Act are not contrary to the principles of English common law. It was held in the well known case of *Macartney* v. *Garbutt*[11] by Matthew, J., that a British subject

[11] (1890) 24 Q.B.D. 368. The granting of immunities by the international official's own country constitutes one of the most controversial points of this branch of the law. *Secretan* 1. c. pp. 72–73 quotes a statement made by Sir Cecil Hurst on behalf of the British Government on the Draft Scheme of the Permanent Court of International Justice, presented to the Council of the League of Nations by the Advisory Committee of Jurists: "The British Government did not think it reasonable that a judge belonging to the country in which the Court had its seat should not enjoy diplomatic privileges. He observed that the same question arose concerning the permanent Secretariat of the League, and expressed the opinion that the time had come to abandon the old diplomatic rule, according to which a person enjoys diplomatic privileges only outside his own country."

accredited to Great Britain by a foreign government is exempt from the local jurisdiction of his own country, but *only*, if he has not been received by the British Government upon the express condition that he shall be subject thereto. The learned judge pointed out that "Bynkershoek . . . and all the later writers on the subject recognise the right of the state to impose such conditions as are thought proper upon the reception of a member of a foreign embassy. But it is said, if the envoy be received without reservation, the condition is to be tacitly implied that he fully enjoys the *jus legationis*. The only mode of escaping from the doctrine of exemption is to impose on the envoy, when received, a condition that he shall be subject to the local jurisdiction. This principle is, as it would seem, with much good sense, extended by later writers to the case of the envoy accredited to his own government." Viewed from this angle, the passing of the present Act and the making of Orders in Council under it implies, in a general way, the positing of the condition that British subjects serving with the international organisation shall to the extent stated there, be subject to British jurisdiction and taxation.

(*B*) *Privileges and immunities under other enactments, and extra-statutory concessions.*

It will be noted that the Act does not deal with immunities from immigration restrictions, alien registration and military service obligations and with facilities as regards exchange restrictions, as recommended by the UNRRA Council Resolution No. 32 I (2) c. Nor does the Act contain provisions implementing Resolution No. 34 which relates to official correspondence of the Administration and recommends, *inter alia*, that the member governments accord to the Administration the same treatment as is accorded by them to the official correspondence of other member governments, including

(*a*) diplomatic status for couriers and pouches of the Administration (Resolution 34 1. 1 (a) III),

(*b*) under appropriate safeguards, exemption from censorship of the official correspondence of the Administration (*ibid.* IV), and

(*c*) appropriate arrangements for the use of codes and of cable addresses for the telegraphic correspondence of the Administration (*ibid.* V).

No provision corresponding to Resolution 36 relating to travel facilities for the staff of the Administration is to be found in the Act.

The absence in the statute of provisions of the kind mentioned does not, of course, mean that the United Kingdom has not acted upon the recommendations of the Atlantic City session of the Council of UNRRA. According to the Report of the Director General, submitted to the second session of the Council, held at Montreal in September, 1944[12] "the United Kingdom Government has agreed,

[12] Published for the United Nations Relief and Rehabilitation Administration by His Majesty's Stationery Office, 1944, p. 66. See also: *Second Session of the Council, Montreal*: September, 1944, Part II: *Reports and Resolutions*, H.M.S.O., 1944, and Cmd. 6566.

subject where necessary to the approval of Parliament, to take the action required to give effect to the recommendations in Resolutions Nos. 32, 34 and 36. Administrative action has already been taken as to most of the recommended privileges and immunities, including immunity from taxation on official salaries, allowances and other emoluments of the Administration's staff who are not British subjects normally resident in the United Kingdom. Legislation has been found necessary only in respect to immunity from legal process for the Administration, its officials and its supplies and equipment, and the inviolability of the Administration's premises and archives."

It is proposed to give here a survey of the position with regard to such privileges, immunities and facilities, as are not dealt with in the Act.

(1) As to immigration restrictions and alien registration (Resolution No. 32 I (2) c *supra*) the law at present in force, Article 14 of the Aliens Order, 1920,[13] made under the Aliens Restriction Acts, 1914 and 1919, as continued by the Expiring Laws Continuance Acts, contains sufficient powers for the executive to give effect to the recommendations, in providing that the Secretary of State may direct that any person or class of persons shall be exempt, either unconditionally or subject to certain conditions, from all or any of the provisions of the Aliens Order.

(2) As to military service, we must distinguish between (*a*) British subjects from outside Great Britain and (*b*) nationals of allied states.

Ad (*a*) Under Section 11 of the National Service (Armed Forces) Act, 1939, as amended by Sect. 8 of the National Service Act, 1941, a national of a Dominion not being ordinarily resident in Great Britain is not liable to be called up. A Dominion citizen who has come to Great Britain as a member of the staff of an international organisation resides there "for a temporary purpose only" and is therefore exempt from military service under the United Kingdom Service Acts.

Ad (*b*) The case of allied nationals is more involved: The Allied Powers (War Service) Act, 1942, has so far been applied to nationals of Belgium, the Czechoslovak Republic, Greece, the Netherlands, Norway, Poland, Yugoslavia,[14] the United States of America,[15] and France.[16] If, e.g., an American citizen enters Great Britain as a member of the staff of UNRRA, he becomes, if of military age, subject to the British National Service Acts, unless he is within two months either a member of the United States Forces or holder of a certificate of exemption issued by the United States government. It would seem that UNRRA is not in a position to exempt him from this liability to serve.

(3) It is declared by Section 1 of the National Service (No. 2) Act, 1941, that "all persons of either sex for the time being in Great Britain are liable to national service, whether under the Crown or not, and whether in the armed forces of the Crown, in civil defence, in

[13] S. R. & O., 1920, No. 448.
[14] S. R. & O., 1943, No. 381.
[15] S. R. & O., 1944, No. 991.
[16] S. R. & O., 1944, No. 992.

industry, or otherwise." Having investigated in the preceding paragraph the position of officers of international organisations with regard to military service with the British forces, we have now to examine the position as to other forms of national service.

Proviso (*b*) of Section 1 of the National Service (No. 2) Act, 1941, is to the effect that the liability of any person to such other form of national service shall be such as may be imposed upon him under Defence Regulations. The Regulation most important in this connection is Regulation 58A of the Defence (General) Regulations. It gives power to the Minister of Labour and National Service or any National Service Officer to direct any person in Great Britain[17] to perform such services as may be specified by the direction. Under this provision the "International Labour Force" Orders have been made which impose on the nationals some allied[18] and enemy[19] countries the duty to register for war work within a certain period.

All the orders which apply to allied nationals exempt from the obligation to register, *inter alia*, members of the government in question, officials of that government engaged upon official business in Great Britain, and allied nationals enjoying diplomatic or consular status. It would be a nice point to decide—though the question is not likely ever to be raised in practice—whether an officer of an organisation of the UNRRA type, who enjoys the immunities and privileges under Part III of the Schedule to the Act, is a national of the allied state in question "enjoying diplomatic or consular status" within the meaning of the exemption clause of the International Labour Force Orders. It is submitted that the immunity under Part III is "an immunity akin to that which Consuls have"[20] and that it is possible to argue that accordingly officers and servants of the international organisation upon whom the rights under Part III have been conferred, are *ipso facto* exempt from the International Labour Force obligations. But even if they are not strictly within the terms of consular status, there was no need of regulating this question in the Act, the Minister of Labour and National Service having sufficient powers to exempt officials of international organisations from any obligations to which they might be subject under the strict wording of the Orders.

(4) Questions of currency restrictions are outside the scope of this note.

[17] Appropriate provisions for Northern Ireland are contained in paragraph 5 of the Regulation. The National Service Acts 1939 to 1942 and the Allied Powers (War Service) Act, 1942, do not extend to Northern Ireland.

[18] Belgium (S. R. & O., 1941, No. 719), the Netherlands (*ibid.* No. 720), Norway (*ibid.* No. 721), Poland (*ibid.* No. 722), Czechoslovakia (*ibid.* No. 723), Greece (S. R. & O., 1943, No. 1049), Yugoslavia (*ibid.* No. 1052). The registration of French nationals was ordered by S. R. & O., 1941, No. 724, at a time when France was not yet an ally *stricto sensu*. In addition, Danish nationals were ordered to register by S. R. & O., 1943, No. 1048.

[19] Austria, Germany and Italy (S. R. & O., 1941, No. 1020); Bulgaria, Finland, Hungary and Roumania (S. R. & O., 1943, No. 1047); Japan (*ibid.* No. 1050); Siam or Thailand (*ibid.* No. 1051).

[20] the Attorney General, Hansard H.o.C., Vol. 403, No. 121, col. 351 (27th September, 1944).

(5) With regard to the facilities claimed by UNRRA for their official correspondence (Resolution No. 34), the Director General reported[21] that upon his request "the United Kingdom and United States Governments made available the facilities of the Foreign Office and the Department of State, respectively, for the forwarding of the Administration's wireless and cable messages and for the handling of its postal correspondence through diplomatic bag and courier services. The resulting arrangements, although adding to the burden upon the facilities of the two governments concerned, were most helpful to the Administration, enabling it to carry out its organising activities and preliminary operations. However fortunate these temporary arrangements have been for handling the Administration's correspondence, it has become increasingly clear that the establishment of an independent system for handling its telegraphic messages would be highly desirable. . . . The Administration and the member governments particularly concerned have consequently made every effort to effect the necessary new arrangements for independent telegraphic operations. Similarly . . . the Administration has been attempting to arrange for the appropriate measures that would make possible the establishment of its own courier and pouch service. Since Washington and London are at the present time the main points for the Administration's communications, the establishment of an independent telegraphic system has depended upon the granting of certain privileges and immunities by the United Kingdom and United States Governments. The United Kingdom has agreed that the Administration may use its own code, and both the United Kingdom and the United States have agreed that the Administration's messages would receive the necessary priority rating in transmission . . . As soon as . . . the necessary technical arrangements (are) made, the Administration will be able to take over its own telegraphic traffic to and from London, Washington, Cairo and Algiers."

(6) On the question of travel facilities for the staff of the Administration (Resolution No. 36) it was stated in the Director General's Report[22] that "virtually all travel by the Administration's officials and employees up to the present time has been exclusively over the facilities of the United Kingdom and United States Governments, both governments making arrangements for air and sea travel and related priorities that have been most satisfactory in meeting the needs of the Administration."

(C) *Some problems involved in the immunity of international organisations.*

In so far as the Act provides for exemption and privileges of international organisations and their staff, it raises a problem which—though not entirely novel—has become particularly important recently, in view of the fact that both the number and the activities of

[21] l.c. p. 67.
[22] l.c. p. 68.

international organisations are steadily growing and will probably continue to increase after the present war.

In the normal case of diplomatic privileges, the envoy who is exempted from jurisdiction and taxation in the country to which he is accredited is subject to the jurisdiction of the civil, and in many cases also of the criminal, courts of his own country, and mostly also to taxation in his own country. A foreign state, which is exempt from the jurisdiction of the courts of another country, may be, and often is, subject to the jurisdiction of its own courts, be it to the ordinary forms of legal procedure or to a modified procedure, e.g., as in England, to petitions of rights. The international organisation which, like UNRRA, is the national of no state, is subject to no municipal jurisdiction, neither in the country where the cause for litigation arises, nor in any other country which is a party to the UNRRA Agreement, To the extent to which the members of its staff are exempt from local jurisdiction, they are exempt from any jurisdiction whatsoever, even if they are nationals of such states as extend the jurisdiction of their criminal courts to their nationals wherever they may be. Parliament was fully alive to this problem. It was pointed out that the people on whom immunities are being conferred are thereby being put "into a juridical vacuum" and members demanded that it should be stated "what tribunal, what body of law, what system of conduct, what codes are to be superimposed upon the national codes of jurisprudence to which these people could be subject."[23] The fact that this problem was not and could not, in the present state of the Law of Nations, be satisfactorily solved, was the true reason for the critical attitude of many Members of Parliament towards the Bill.

The problem has recently been discussed by Dr. Friedmann[24] who contends that an international administrative tribunal is the necessary counterpart to the immunity from national jurisdiction, which must be granted to servants of a public international institution. It must be clothed not only with adequate jurisdiction, but also with adequate authority and powers of enforcement, e.g., with the right to make orders which entitle the creditor to attach assets of the defaulting debtor, be he an international official or the international organisation itself, in any member state.[25] The international organisation must, where it moves in the sphere of commerce and private law, be justiciable and be subjected to the laws properly applicable to the transaction in question, but it is a very different question whether reference to national laws should imply national jurisdiction, and in this field, too, the learned author recommends that matters concerning International Public Corporations should be referred to international tribunals. Dr. Friedmann defines International Public Corporations as

[23] Hansard, H.o.C., Vol. 403, No. 121, col. 363–366 (27th September, 1944).

[24] "International Public Corporations," 6 *Modern Law Review* (No. 4, December, 1943), pp. 185 *et seq.*, at p. 198.

[25] Cf. C. Wilfred Jenks, *Some Legal Aspects of the Financing of International Institutions*, 28 *Transactions of the Grotius Society* (1942), pp. 87 *et seq.*, at p. 113; and Friedmann, lc. p. 193.

"international corporate bodies established for purposes of international government, but constituted as commercial corporations."[26] But what he says on the question of justiciability and jurisdiction applies, of course, also to such international institutions, international organisations[27] and agents of the international community[28] in general, as are not constituted as commercial corporations.[28a]

With regard, particularly, to the question of criminal responsibility of persons enjoying diplomatic privileges, suggestions have been put forward about methods of bridging the gap in the present state of the law by Professor A. Lewitt in "A Proposed Code of International Criminal Law" and by Professor V. V. Pella in his Proposals for the 23rd Inter-Parliamentary Conference (1925),[29] who both include the abuse of privileges by a diplomatic agent among "international crimes."

In the meantime, i.e., before such ambitious schemes materialise, the following possibilities exist in the United Kingdom for the protection of persons who enter into relations with an international organisation.

(*a*) As regards contractual liabilities of the international organisation the Attorney General stated on the Second Reading of the Bill[30] that it was desired by everybody that there should be no prejudice to persons who entered into contract with it (i.e., with UNRRA). Its contracts will contain arbitration clauses which have been approved by the Law Officers of the Crown and UNRRA will not prevent access to the courts.

It was stated that in the case of international bodies other than UNRRA, the Government, before making an Order in Council, would insist on similar arrangements being made.

(*b*) As to tortious liability of the Organisation and of its officers, as far as they share the immunities, the House of Commons was informed of an arrangement covering "running down" cases. "The facts are that we have an arrangement with the Diplomatic Corps in which the members of that Corps, or their chauffeurs driving them are insured with an insurance company under the Road Traffic Acts, in the same way as any other persons. Liability to pay damages, if they fall due, thereby falls on the insurance company, and it is part of the arrangement made with the Diplomatic Corps and the insurance company, that if it is necessary to have recourse to the courts in order

[26] l.c. p. 186.

[27] The expression used in the marginal note of Sect. 1 of the Act.

[28] Cf. Secretan, l.c. n.3.

[28a] While this article was being printed two notes on subjects closely connected with the problems discussed have become available in this country, viz: "Status of International Organisations: Privileges and Immunities of their Officials," by Philip C. Jessup, and "United Nations Monetary Conference and the Immunity of International Agencies," both in 38 *American Journal of International Law* (1944) No. 4 (October, 1944), at pp. 658 and 662 respectively.

[29] Quoted by G. Weis, *International Criminal Justice in Time of Peace*, 28 *Transactions of the Grotius Society* (1942), pp. 40–41.

[30] l.c. 16 col. 351, see also statement by Mr. Law, 13th October, 1944, col. 2090.

to determine the question of liability, or the amount of damages, no diplomatic immunity shall be raised by the insured person or the insurance company to prevent the matter being decided."[31]

(*c*) No special remedy exists in cases of other torts for which the international organisation and the members of its staff, enjoying immunities under Parts II and III of the Schedule, are responsible.

(*d*) The same applies to the criminal responsibility of privileged members of the organisation's staff. In these cases the British Government assume that these organisations, to which they themselves belong, "will behave with a reasonable degree of common sense and honour." In cases which would lead to injustice or hardship, immunity may be waived or the Foreign Office must take them up. The Government have influence both from within and without.[32]

As an example of the manner in which international organisations of this kind treat the question of diplomatic immunity, a sentence from the instructions given to the staff of the I.L.O. by the Director of that Organisation was read to Parliament. It is as follows: "The Director can in no circumstances permit the use of these immunities for other than their legitimate purposes, and will have no hesitation in waiving them in every case where they constitute an obstacle to justified demands that do not affect the interests of the I.L.O."[33]

The remedy available in cases (*c*) and (*d*) is the waiver of immunity by the defendant and, if necessary, the exercise of diplomatic pressure by His Majesty's Government towards achieving it.

APPENDIX

The Application of the Diplomatic Privileges (Extension) Act, 1944, to UNRRA, UNIO, the Refugees Committee, and the EAC.

After the above article had been printed the provisions of the Act, relating to international organisations, were applied to UNRRA by Order in Council, dated January 24th, 1945, (S.R. & O., 1945, No. 79). By Order in Council of the same day (S.R. & O. 1945, No. 84), they were applied to the United Nations Information Organisation (UNIO), the Intergovernmental Committee for Refugees, and the European Advisory Commission (EAC). Under these Orders the four organisations have the immunities and privileges set out in Part I of the Schedule to the Act (immunity from legal process, inviolability of premises, exemption from taxes and rates, as stated above). With the exception of the EAC, which is not a legal *persona*, the organisations also have the legal capacities of a body corporate.

Immunities under Part II of the Schedule (full diplomatic privileges) are given to one representative of each member Government on the Council and on a standing Committee of UNRRA, on the Council of

[31] Mr. Richard Law, 13th October, 1944, col. 2094.
[32] Mr. Richard Law, 13th October, 1944, col. 2114–5; the Attorney General 24th October, 1944, col. 133.
[33] 13th October, 1944, col. 2093.

UNIO, on the Executive Committee of the Refugees Committee, and on the EAC. Immunities under Part II are further granted to a small number of the highest officers of the organisations, viz. the Director-General and the Deputy Directors-General of UNRRA, the Secretary General and Deputy Secretary-General of UNIO, the Director and Vice-Director of the Refugees Committee, and the Secretary-General and the Secretaries of the EAC. The number of persons falling under this category is restricted in the case of UNRRA to eight, in the case of EAC to six, and in the cases of UNIO and the Refugees Committee to two at any one time.

The "other officers and servants" of the organisations are by the Orders divided into two classes. The higher officers: the Assistant Deputy Directors-General, Directors, Heads of Sections, Principal Officers, Administrative Officers of UNRRA, the Directors of Divisions of UNIO, and the Secretary and the Treasurer of the Refugees Committee, enjoy the privileges and immunities to the full extent of Part III of the Schedule ((1) immunities from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties and, (2) exemption from income tax in respect of emoluments received as an officer or servant of the organisation). The immunities and privileges of lower officers are restricted to the exemption from income tax in respect of official salaries.

According to the provisions of the Act the Orders contain special provisions regarding British subjects, who receive less favourable treatment.

EGON SCHWELB

INDUSTRIAL ABRITRATION IN AUSTRALIA

THE Australian industrial and arbitration system is the outcome of circumstances and conditions which were peculiar to Australia, a country roughly in size equal to that of the United States of America and peopled by only seven millions. Untrammelled by the traditions of the past, her industrial organizations in their infancy, she seized the opportunity of fashioning an industrial system which was suitable not only to her pioneering background and natural resources, but was based on laws which had a strong democratic flavour. The key-stone of this system is conciliation, failing which, arbitration. To adopt such a principle for the regulation of industry may be regarded as providing an interesting field for the testing of advanced and progressive legislation. With the giant strides that this century has witnessed in industry, Australia regards her essay into the rather uncharted legislative sea of industry as being successful. That the machinery of the arbitration system groans, and, in some cases, breaks down, must be admitted, but woe betide any Government

which seeks any radical alteration to that system. To the wilderness of the Opposition benches is the invariable answer of the Australian electors.

To appreciate the readiness with which the system of Australian industrial arbitration found acceptance, a short review of the labour conditions prevailing in the country's short history may be appreciated. The first Australian labour force was composed entirely of convicts, who received as wages only enough for mere subsistence. As the country was gradually opened up and free immigrants began to arrive, another group of free labourers came into the market. They, however, had to compete for wages with the scale paid to convict servants, and until the middle of the 19th century, the story of labour conditions in Australia is a very barren one. However, the discovery of gold in 1851 proved a lode star which drew immigrants to Australia in their thousands. The tide of immigration set in strongly towards the shores of Australia, and the growth of an industrial movement became vigorous. In 1854 occurred an armed insurrection amongst Ballarat miners who objected to the principle of taxation without representation, and at the Eureka Stockade attempted to uphold their principles by armed force. The military quickly crushed the forces of the miners, but their demands were finally met, and labour had begun to feel its power. The influx of so many men to the gold-diggings caused an immense shortage of labour generally, with the result that wages rose, and, as is usual in such circumstances, the conditions of labour improved. Many of the immigrants came from England, and carried with them ideas which were fermenting in the social system here. The ideas of the English Chartists fell on ready ears, trade union thinkers propounded their principles, and so the idea of building protective organizations for workers began to emerge amongst Australians. History records the first attempt at organizing a trade union in Australia as the formation of the Operative Masons' Society in Melbourne in 1850, and within twenty years the idea of the trade union became popular. It is possible to trace a gradual progressive growth of unions, first amongst the building trade, followed by the miners, then the pastoral industry, the water-side workers, and the water-side transport generally. With the formation and growth of these unions, the main issue between employers and employees was what is now known as the open or closed shop issue. As the unions began to feel their strength they became interested in political problems, and in 1890 the employers accepted the challenge of the growing power, industrial and political, of the unions and gave battle. The unions entered the fray in strength, the chief weapon being the strike, together with some more direct weapons, such as burning shearing-sheds and damaging property. Strikes spread amongst the shearing, coastal and water-side workers, and the metal and coal miners, their battle-cry being the closed shop. As the industrial battle raged in all its fury, Australia went through one of its worst periods of depression, and finally the unions were completely defeated. Out of this defeat

there emerges a two-fold influence on the growth of the labour movement, as organized labour then turned to the political sphere as a more probable way of securing their demands, and the idea of settling industrial disputes by means of conciliation and arbitration came strongly to the fore.

During this period of its history, one of the big political questions affecting the minds of Australians was whether Australia should continue to have six States, each with its own representative Government, or federate into a Commonwealth, and one of the advantages which was put forward for the proposed federation was that a system of Australia-wide arbitration could be formed to deal with industrial disputes. Finally, the first Federal Parliament of the Commonwealth of Australia met in May, 1901. One of the early subjects debated by this Parliament was that of industrial arbitration, and in 1904 was passed the Commonwealth Conciliation and Arbitration Act which set up the machinery for the settling of industrial disputes. The main objects of the Act are expressed to be to promote good-will in industry by conciliation and arbitration by means of a Court which works through organizations of employers and employees. If possible, an amicable agreement is made between the various parties in regard to the working of an industry, and the agreement is enforced by the Court. In default of an amicable agreement the disputes are referred to the Court, which, after hearing evidence and enquiring into the subject of dispute, itself makes an award binding on the parties.

The Court, which is a Court of record, consists of a Chief Judge and four other Judges, each of whom must be a barrister or solicitor of the High Court of Australia or of the Supreme Court of a State of not less than five years' standing.

The function of the Court is to deal with industrial disputes which are defined by the Act as meaning "an industrial dispute extending beyond the limits of any one State, and includes—

(*i*) any dispute as to industrial matters;

(*ii*) any dispute in relation to employment in an industry carried on by, or under the control of, the Commonwealth or a State or any public authority constituted under the Commonwealth or a State; and

(*iii*) any threatened or impending or probable industrial dispute."

"Industrial matters" includes all matters relating to work, pay, wages, award hours, privileges, rights or duties of employers or employees, or the mode, terms and conditions of employment or non-employment, and in general includes all matters pertaining to the relations of employers and employees.

The Court acts through registered organizations, which are bound by their own rules but subject to the control of the Court. The organization may consist of an association of employers or employees. An association of employers consists of any number of employers in an industry who, over a period of six months, have employed not less

than 100 employees during that period. An association numbering not less than 100 employees engaged in or in connection with an industry may be registered as an employees' organization.

Any organization or association, whether of employers or employees, may apply to be registered with the Court, and on a copy of its rules being approved, a Certificate of Registration is granted to it. In any industrial disputes before the Court, the parties consist mainly of organizations of employers and employees, but the Court has wide powers of summoning before it not only registered organizations, but also any person interested in the dispute before it.

In any industry, parties are empowered to make an agreement in regard to the conditions of the industry, and this agreement is registered by the Court and its terms become binding on the parties to it. In the event, however, of a dispute which extends beyond the boundaries of one State, and the parties not being able or desirous of coming to an agreement, the machinery of the Court is then set in motion. Conciliation commissioners are appointed by the Act, and a conference is summoned between the parties to endeavour to come to an agreement, but if they are unable to agree on the terms the dispute is then referred to the Arbitration Court, which will ensure that all parties interested in the dispute are before it. The Court proceeds to investigate the whole matter in dispute, hears evidence, and then makes an award which is binding on all the parties. In coming to its conclusion, the Court is given a very free hand, and acts according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal form. It is not bound by any rules of evidence and may inform its mind on any matter in any way it thinks fit. The award of the Court is expressed in such a way as to avoid unnecessary technicalities and continues in force for any period expressed in the award, but not longer than five years. During the period it may be altered or varied by the Court or by agreement, or the period may be extended.

To enforce an award the Court lays down certain penalties and sanctions, the main ones of which are—

(*a*) For breach of an industrial agreement an organization is liable to a penalty up to £500, in the case of an individual employer up to £250, and in the case of an employee up to £10.

(*b*) The Court may, if in its discretion it thinks fit, order the registration of an organization to be cancelled. This means that the organization is unable to approach the Court, and its members lose the benefit of any award. A new organization may apply to be registered in its stead with a new set of officials, but usually the offending organization has before that purged its offence and is re-registered.

(*c*) For the breach of an award penalties are fixed which may be awarded by the Court.

As the terms of an award only apply to the parties to the dispute, there will be a number of employers and employees who are not bound

by it, and the Court is empowered to make the award or any part of it a common rule, which is binding on all employers and employees irrespective of whether they are members of an organization or not, throughout the industry, either throughout the whole of the Commonwealth or any part only.

It will be appreciated that, as the Arbitration Court acts through organizations, the growth of trade unions has flourished in Australia, as organizations of employees are almost invariably Trade Unions. The Court is expressly empowered by the Act to give preference to members of organizations, which may be expressed as compulsory trade unionism. This power, however, owing to political reasons, is seldom exercised by the Court.

Another important power vested in the Court deals with the position, such as frequently happens, where a militant minority has captured power in a Union and is fomenting trouble. In such a case, or in fact whenever it considers it necessary, the Court may order a secret ballot to be taken to ascertain the views of the members of a union, and if it considers advisable it may order the men back to work.

One of the main functions of the Court is to fix the wage which an industry should pay. This is effected by fixing a basic wage, which is the lowest wage which can be paid to an unskilled worker in full employment, and bears a relation to the normal needs of an average worker regarded as a human being in a civilized community. In 1907 Mr. Justice Higgins, in making an award in the Harvester case, fixed the basic wage at £2 2s. a week, which he regarded as the minimum wage required for an unskilled worker and his family. Since then all awards fix a basic wage and allow special margins for skill. The principle of the basic wage has been retained since the Higgins award, but has been increased following the increase in the cost of living. It is always subject to a fluctuating addition known as the cost of living index, to ascertain which certain basic commodities are fixed by the Commonwealth Statistician, and as the cost of these commodities fluctuates, so too does the basic wage.

Mention must also be made of the various State industrial tribunals which have been set up to deal with industrial matters within the State. The exercise of their powers has never been conditional upon the existence of an industrial dispute, nor are they restricted to conciliation and arbitration, but are at liberty to proceed legislatively if and when they choose. As the State tribunals have as their province the affairs of industry within the local limits of that State, over-lapping and duplication between the work of the Commonwealth Arbitration Court and the State Tribunals is unavoidable, but is steadily being reduced. It has been decided that, where there is an inconsistency between a Federal award and the award of a State Tribunal, the Federal award is to prevail. The Commonwealth Arbitration Court may also restrain State Tribunals from proceeding in a matter already covered by it, or which is being dealt with by it. The awards and determinations of the various State Tribunals are legally enforceable.

It is not within the province of this article to discuss to what extent Industrial Arbitration in Australia has been a success. The principle has obtained acceptance by the people as a whole, and while criticism may be levelled against it in many respects, it has helped to create a high standard of living. Australia lacks many of the advantages enjoyed by older countries, e.g. an economic organization which has stood the test of time, ample supplies of capital and labour, and a plenitude of markets for the disposal of her products. It is considered, however, that as a basis of her industrial system, compulsory industrial arbitration has proved a sure foundation.

LL. JONES

STATUTES

The Wages Councils Bill

The Wages Councils Bill which, at the time of writing, has passed its Third Reading in the House of Commons, is the most important legislative step in the field of industrial relations to be taken since the outbreak of the war. The new Act will take the place of the Trade Boards Acts of 1909 and 1918, but it will not affect the statutory wage regulation machinery under such special enactments as the Agricultural Wages Act, the Road Haulage Wages Act and the Catering Wages Act. The legislative principles underlying these statutes have, on the other hand, profoundly influenced the Bill one of whose professed objects it is "to bring the powers of Trade Boards, which will be re-named 'Wages Councils' into line with those of analogous bodies established under later legislation."[1] It is, therefore, not only a reforming, but also a unifying, clarifying and simplifying measure.

Stripped of its technicalities (which are formidable) the Bill appears as a piece of social reform designed to give effect to three new guiding principles. It is, in the first place, a deliberate attempt to use the statutory wage fixing machinery for the purpose of maintaining and strengthening existing voluntary institutions established in a given industry. In the second place, it charges the statutory wage fixing bodies with the task of determining the "remuneration" to be paid to a given type of workers by their employers, and thus removes at one stroke the strait-jacket of the "trade" as the exclusive unit of operation of this type of legislation and the tangled pattern of the various time and piece rates into which the Trade Boards had to fit their activities. Thirdly, it transfers into peace-time legislation one of the ideas embodied in the Conditions of Employment and National Arbitration Order of 1940[2]: it imposes—for a limited period—upon employers the obligation to observe "recognised terms and conditions" and gives to the Industrial Court the power to make legally binding awards embodying the terms of collective agreements.

The following observations are confined to these three principal aspects of the Bill.

1. Under the Trade Boards Act, 1918, the Minister of Labour is empowered to establish, by special order, a trade board, "if he is of the opinion that *no adequate machinery exists* for the effective regulation of wages throughout the trade and that, accordingly, having regard to the

[1] Explanatory and Financial Memorandum, No. 1 (i).
[2] See the discussion of this Order in the article M.L.R. vol. 6. p. 112.

rates of wages prevailing in the trade or any part of the trade, statutory wage fixing machinery should be introduced (1918 Act, Section 1 (2)). Compared with the corresponding provisions of the Trade Boards Act, 1909, this enactment (which gave partial effect to the proposals of the Whitley Committee) was a considerable improvement. Under the 1909 Act (Section 1 (2)) the Board of Trade, before establishing a Trade Board, had to satisfy themselves that "the rate of wages prevailing in any branch of the trade is *exceptionally low*, as compared with that in other employments." The transition from the regime of the 1909 Act to that of the 1918 Act marked a revolutionary change in the social function of the trade boards: while under the earlier statute they had been devised to combat the scourge of the "sweated" industries, they now became a substitute for the voluntary negotiating machinery in those "trades" which, for one reason or another, did not lend themselves to voluntary organisation. The present Bill involves an equally fundamental innovation: "Hitherto the State has not intervened to prevent joint voluntary machinery from breaking up, even though it was clear that the results would be that wage standards would become unduly depressed and that intervention would eventually be necessary. The State has had to stand aside and allow organisation to break up and conditions to deteriorate to a low level before action could be taken."[3] Now, however, the Minister will be able to make a "wages council order" on two alternative conditions[4]: (*a*) in the absence of adequate voluntary machinery in circumstances analogous to those in which a trade board can be established under the 1918 Act, or (*b*) where such machinery exists, but is likely to come to an end or to cease to be adequate for the effective regulation of the remuneration of the workers concerned and a reasonable standard of remuneration will not be maintained.[5] In order to appreciate the implications of this second alternative one should refer to the statutory definition of machinery "adequate for regulating the remuneration of employment."[6] Three questions must be answered in order to arrive at a conclusion as to whether voluntary negotiation machinery satisfies the requirement of "adequacy": (*a*) "What matters are capable of being dealt with by that machinery?": (*b*) "To what extent are those matters covered by the agreements or awards made under that machinery"? (*c*) "To what extent is the practice, or is it likely to be, in accordance with those agreements or awards?" As is evident, especially from the statutory formulation of question (*c*), the Bill not only presupposes that collective agreements and awards will continue to be legally unenforceable (outside the narrow limits of the Third Part of the Bill discussed below), but that it intends -and this is an entirely new departure— to use the statutory apparatus of the wages councils as a prop for tottering bargaining machinery, i.e. as a means of clothing with statutory enforceability the contents of collective agreements which fail to be universally observed in a given industry. This, as the Minister pointed out upon the Second Reading of the Bill,[7] is a matter of particular importance at the moment when the wartime controls of industry, or of some of them, are lifted at the end of the hostilities. "During this war over 40 industrial councils have been established. They have been made effective largely because the industries

[3] Mr. Bevin introducing the Bill upon the Second Reading, *Hansard*, 407 col. 77.
[4] Clause 1 (2).
[5] See the wording of Clauses 2 (1) and 3.
[6] In Clauses 4 (6) and 6 (5).
[7] Hansard, *ibid.* cols. 78-79.

have been under control. . . . It may be that control will go, and when the crisis comes shall those councils be allowed to break up? . . . . It would be a tragedy if what happened at the end of the last war occurred at the end of this. At the end of the last war all this great work was broken up almost in an hour." The Minister went on to remind the House of the notorious difficulties connected with the organisation of industries in which large proportions of women are employed. It is for such industries, including the distributive trade, that the new powers have largely been formulated.

The exercise of these new powers is surrounded with a number of safeguards. When the Minister proposes to establish a Wages Council under the new clause (2) (*b*), i.e. when statutory wage fixing machinery is to be set up in view of the inadequacy of existing voluntary boards, councils, etc., or of their tendency to disappear, he must refer the matter to a Commission of Inquiry, and cannot act unless the Commission makes a "wages council recommendation."[8] The procedure leading up to a reference to the Commission links the setting up of wage fixing bodies with the action of the voluntary organisations on both sides. (The Trade Boards Acts do not even provide that they are to be consulted). Clause 2 gives them a right to apply for the establishment of a wages council, *provided they act jointly*. If this happens either in the form of an application of both organisations joined *ad hoc* or in that of an application made by a permanent joint body such as a joint industrial council or conciliation board, the Minister *must* refer the matter to a Commission of Inquiry. In the absence of such an application, the Minister *may*, under Clause 3, take a similar step *proprio motu*. In other words: no organisation has a *right* to use the reference to a Commission of Inquiry as a weapon against the other, e.g. because it has failed to achieve by voluntary negotiation those conditions of employment which it set out to achieve. There is some analogy between these provisions and the ideas underlying the Cotton Manufacturing Industry (Temporary Provisions) Act of 1934.

The "wages council recommendation"—which may extend to workers whose work is "complementary, subsidiary or closely allied"[9] to that of any workers specified in the reference—does not bind the Minister. Whether or not he will act upon it, depends on the exercise of his discretion.[10] One further provision demonstrates the new co-operation between statutory and voluntary machinery:—A Commission of Inquiry which arrives at the conclusion that no wages council order is required, but that existing voluntary machinery "can by improvements which it is practicable to secure be made adequate," may include in its report to the Minister suggestions for such improvements. In this case the Minister *must* "take such steps as appear to him to be expedient and practicable to secure the improvements." The State extends its helping hand in order to strengthen the existing voluntary bodies so as to obviate the need for its own action.[11]

2. Any lawyer who has tried to find his way through the maze of the Trade Boards Acts[12] and to understand the intricacies of the various time

[8] These provisions, like those discussed above, largely follow the pattern of sections 3 to 5 of the Catering Wages Act, 1943.

[9] Clause 4 (1).

[10] Clause 4 (5).

[11] Clauses 4 (2) and (3).

[12] The writer confesses that he would have lost his way, had it not been for the lucid explanation in Mr. Tillyard's book *The Worker and the State*, 2nd. ed. pp. 47-62.

rates which a trade board must[13] or may[14], and of the various types of piece rates which it may fix,[15] will be gratified to learn that the Bill is making a clean sweep of all this casuistry. Henceforward the Councils will have power to propose "the remuneration to be paid, either generally or for any particular work, by their employers to all or any of the workers" concerned.[16] This is not only an enormous simplification—removing, *inter alia*, the need for a special provision as to "waiting time"[17]—but, at the same time, a considerable piece of social reform. It carries over the idea of the "statutory guaranteed week" from the Essential Work Orders into peace-time conditions.[18] The wages councils will be able to solve such problems as to who is to bear the risk of the worker's "impossibility of performance," whether such impossibility be caused by sickness or other circumstances preventing him from tendering his services, or by events occurring in the employer's sphere such as lack of raw materials or fuel, breakdown of machinery etc.

Apart from the remuneration question, the councils will be able to fix holidays with pay.[19] The Holidays with Pay Act, 1938, will cease to be applicable to the "trade board industries."

In Committee one of the most keenly debated issues was that of the deductions an employer is permitted to make from the statutory minimum wage fixed by the council.[20] But despite their legal difficulties—the relevant provisions may possibly impinge upon the complicated network of the Truck Acts—these matters are not comparable in significance with the basic provisions of the Bill.

In abandoning the "trade" as the unit with respect to which a given council operates, and in substituting the "wages council" for the "trade board," the Bill has not only eliminated a reminder of the bad old days of the "sweated industries." It has given a higher degree of flexibility to the machinery, and, incidentally, simplified its structure. The District Trade Committees[21] will no longer be required, since wages councils, as distinguished from trade boards, will be able to be set up on a regional basis. All that is necessary under the new dispensation is a power vested in a wages council[22] to delegate any of its powers to a committee or sub-committee consisting entirely of a number of its own members. Such committees need not contain any "independent" member (the new name for the "appointed" members), but both sides must be equally represented.

On the other hand, the disappearance of the rigid "trade" criterion has opened the way for a more flexible co-ordinating machinery: The

[13] "General minimum time rate": Trade Boards Act, 1909, s. 4 (1), as amended by the Trade Boards Act, 1918, s. 3 (1).

[14] "Piecework Basis Time Rate": Trade Boards Act, 1909, s.8 (2), in the form given to it by the Trade Boards Act, 1918, s. 6 (2). "Guaranteed time rate"; Trade Boards Act, 1909, s. 4, (1) as amended by Trade Boards Act, 1918, s. 3 (1) (b), and "Overtime Rate," Trade Boards Act, 1909 s. 4 (1), as amended by Trade Boards Act, 1918 s. 3 (1) (c).

[15] "General minimum piece rate": Trade Boards Act, 1909, s. 4 (1), as amended by Trade Boards Act, 1918, s. 3 (1) (a). "Special minimum piece rate" Trade Boards Act, 1909, s. 4 (5), "Overtime rate," as above.

[16] Clause 10 (1) (a).

[17] Trade Boards Act, 1918, s. 8.

[18] This was especially emphasised by the Minister, Hansard, *loc. cit.* col 75.

[19] Clause 10 (1) (b) and (2).

[20] See Clause 13 and Hansard *loc. cit.* 1671–1685.

[21] Trade Boards Act, 1909, s. 12.

[22] Schedule I No. 6.

Bill[23] gives to the Minister the power of establishing "Central Co-ordinating Committees" after consultation with the wages councils concerned (except where he acts upon the recommendation of a Commission of Inquiry). These Central Co-ordinating Committees will have three functions: they will consider, and report to the Minister on, the field of operation of the wages councils in order to see whether these fields of operation are "properly divided," they will make general policy recommendations to the councils themselves, and, finally, they will report on any question referred to them by the Minister or any wage council or councils.

3. The third, and, in some ways, the most fundamental innovation is contained in the Third Part and in the Third Schedule of the Bill. These are not concerned with the statutory remuneration fixing bodies at all, but with the legal effect of voluntary collective agreements. The relevant temporary provisions of the Conditions of Employment and National Arbitration Order were discussed in these pages on a previous occasion.[24] The existence of the National Arbitration Tribunal will terminate at the end of the war, and with it the system of compulsory arbitration set up under Article 2 of the Order of 1940. This will put an end to the "binding" effect of agreements, decisions and awards made upon a reference of a dispute to the Minister. The Bill makes no attempt to carry over any of these provisions into the post-war period. What it does is to give semi-permanent effect (i.e. prolongation for an experimental period to expire in 1950) to the provisions of Article 5 of the Order of 1940 which relate to "recognised terms and conditions," not, however, without modifying the terms of those provisions in certain important respects. The obligation to observe collective agreements or terms and conditions "not less favourable" is primarily imposed by the Order upon the employers. This will continue to be the case, but the penal sanction (Defence Regulation 92) will disappear. Nor is there to be any contractual enforceability or compulsory normative effect of the agreements themselves. It will, however, be possible to report to the Minister any question as to the nature, scope and effect of the recognised terms and conditions, and as to their observance by an employer, provided the report is made within twelve months after the question first arose. The Minister must then refer the question to the Industrial Court for settlement. The award of the Industrial Court will be binding upon the individual employers and workers (whether organised or not) and become an implied compulsory term of their contracts. Like the corresponding awards of the National Arbitration Tribunal it will not simply be an interpretative, but a policy-making decision, since the terms and conditions of similar workers in comparable industries will be taken into account.

The Bill greatly strengthens the power of the Industrial Court (as compared with that of the National Arbitration Tribunal) to give retrospective effect to its awards, and indeed makes it a duty of the Court in certain circumstances to do so. Workers who are within the purview of any type of statutory wage fixing machinery are entirely outside the new regulation, and some of the greatest difficulties encountered in the interpretation of the Order of 1940 have thus been removed.[25]

O. KAHN-FREUND

[23] Clause 8.
[24] *Modern Law Review*, vol. 6, pp. 112-143, especially pp. 132 sqq.
[25] Clause 19, para. 2.

NOTES OF CASES

Jurisdiction in Matrimonial Causes

The case of *Hutter* v. *Hutter*, [1944] 2 All E.R., 368, has clarified to a great extent the rather involved state of the law governing the question of jurisdiction in nullity cases. The facts in that case were similar to those in the recent case of *Easterbrook* v. *Easterbrook*, [1944] P. 10: An American soldier sought a decree of nullity against his wife, an Englishwoman, on the ground of her refusal to consummate the marriage. Both parties were resident in England at all material times, but it was admitted that the husband was domiciled in the United States.

No appearance was entered by the respondent, but Pilcher, J., caused the papers to be forwarded to the King's Proctor in order that he might appear and have the matter fully argued before him.

The result of a careful consideration of the authorities concerned was that the learned judge followed the decision of Hodson, J., in *Easterbrook* v. *Easterbrook*, and decided that the English Court had jurisdiction to entertain the suit. His decision is a death blow to the theory that in cases of nullity proceedings the court of the domicil has exclusive jurisdiction. It would seem to establish that the jurisdiction of the Court of the place of residence in nullity cases is not merely exceptional, but that residence of the respondent is always sufficient to establish the jurisdiction of the English Court in such cases. The decision is mainly based on Sect. 22 of the Matrimonial Causes Act, 1857, which is substantially still in force, and which provides that in all matrimonial causes other than proceedings for dissolution of marriage the Court should act on the same principles as had previously been applied by the Ecclesiastical Courts. The learned judge ascertained that the Ecclesiastical Courts had always pronounced on the question of nullity of marriage, provided the party against whom relief was sought was resident within the jurisdiction, and that "provided the residential qualification was fulfilled, the Ecclesiastical Courts did not concern themselves with questions as to the domicil of the parties." The learned judge rejected the distinction drawn in *Inverclyde* v. *Inverclyde*, [1931] P. 29, between void and voidable marriages, and pointed out that the Ecclesiastical Courts had never drawn this distinction when deciding on questions of jurisdiction. He held that "it is now established by a long line of authorities that in nullity suits when the marriage is void *ab initio* residence is sufficient to confer jurisdiction."

Pilcher, J., dispelled the doubts as to the extension of this principle which could still be raised after the decision in *Easterbrook* v. *Easterbrook*, [1944] P. 10.[1] The only point which was taken to be relevant was the question whether the party against whom relief was sought was resident within the jurisdiction. The domicil of that party was held to be just as irrelevant as the domicil of the petitioner, except in so far as it assisted the learned judge in establishing that the respondent was in fact resident in this country. Further, it was held that the dictum of Lord Phillimore in *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641, at p. 671, which has frequently been quoted in favour of the exclusive jurisdiction of the Court of the domicil in nullity cases, had not been necessary to the decision, and the learned judge was not satisfied that "in using the words which he did Lord Phillimore intended to lay down a general proposition

[1] See my note in 60 *L.Q.R.* 115.

which would have the effect of ousting the jurisdiction of the Courts of this country to entertain a nullity suit where the parties, although resident, were not domiciled within the jurisdiction."

It was also held that the fact that no appearance had been entered was immaterial to the decision.

It may therefore be submitted that the Courts of this country have jurisdiction to entertain a suit of nullity wherever the respondent is resident within the jurisdiction, irrespective of—

(1) The petitioner's domicil—and as it would appear, his residence;
(2) The respondent's domicil;
(3) The question whether the respondent has entered an appearance.

However, this decision does not establish that residence is an essential condition for the Courts of this country to entertain jurisdiction in nullity suits. Thus, Pilcher, J., stated in *Hutter* v. *Hutter* that "a decree of nullity of marriage being declaratory of the status of the parties to the marriage contract, it is no doubt desirable on grounds of public policy that such decree should be pronounced by the competent court of the domicil."[1a]

Unfortunately, it is not yet settled what law is to be applied where the English Court assumes jurisdiction in nullity suits on the ground of the respondent's residence in this country. Neither in *Easterbrook* v. *Easterbrook* nor in *Hutter* v. *Hutter* was this question raised, and English law—Sect. 7 of the Matrimonial Causes Act, 1937—was applied to the decision of the case. But the learned judges did not state whether it was applied as the *lex fori*, as the law of the place of the respondent's domicil, or as the *lex domicilii* of the petitioner following the principle that foreign law is presumed to be the same as English law, unless otherwise pleaded. It may be regretted that the decision in *Hutter* v. *Hutter*, which otherwise has succeeded considerably in clarifying the law on this problem, has left this one point still undecided.

A few days after his decision in *Hutter* v. *Hutter*, Pilcher, J., gave another important judgment relating to the question of jurisdiction in matrimonial causes in the case of *Sim* v. *Sim*, [1944] 2 All E.R. 344. In that case a wife had filed a petition for judicial separation against her husband who was not domiciled but resident in this country. The wife had never been in fact resident in this country, and the proceedings were contested by the husband on the ground that English Courts had no jurisdiction because the requirement stated by Dicey[2]—residence of both parties within the jurisdiction at the time of the institution of the suit—had not been fulfilled. Pilcher, J., however, refused to accept this argument. He ascertained that "the Ecclesiastical Courts regarded an unseparated wife as *prima facie* physically resident where her husband was resident, and also that whilst the residence of the party against whom relief was sought was regarded as all-important, the actual residence of the party seeking relief never seems to have been regarded as important or to be inquired into, *probably* because an unseparated wife was regarded as resident in law where the husband was resident."

[1a] Nor, it is submitted, does the decision affect the principle stated by Dicey (Rule 65, 5th ed., p. 294) that the English Courts have jurisdiction to entertain a suit for nullity of marriage if England was the *locus celebrationis* of the marriage. And following the refusal by Pilcher, J., to distinguish between void and voidable marriages for the purposes of jurisdiction, it would appear that this rule may now be said to apply to all nullity suits.

[2] Rule 64 (1), see 5th ed., p. 288.

Following this line of thought the learned judge saw no reason why the Court "acting on the principles which conform to the principles acted upon by the Ecclesiastical Courts should attach any importance in a suit for judicial separation to the actual residence of a wife who has herself invoked the process of the Court, and submitted to its jurisdiction." Accordingly it was held that the Court had jurisdiction to entertain the suit.

It is submitted that this case decides that in a wife's petition for judicial separation where jurisdiction is claimed on the ground of residence, all that it is relevant for the Court to ascertain is the husband's residence. It may be noted, however, that in *Sim* v. *Sim* the wife, by filing a petition in this country, was held to have voluntarily submitted to the jurisdiction, and that this point considerably influenced the decision. It may also be pointed out that the learned judge did not commit himself on the question whether the wife's residence always follows her husband's residence in a similar way as her domicil always follows that of her husband. He merely held that such a presumption was "probably" the reason why the Ecclesiastical Courts had never inquired into the question where the wife was in fact resident. Apparently all the cases referred to by Pilcher, J., were wife's petitions. A decision on this problem may become necessary in a case where the facts are the reverse to those of *Sim* v. *Sim*, e.g. where a husband resident, but not domiciled in this country files a suit for judicial separation against his wife who is not in fact resident within the jurisdiction, and who does not voluntarily submit to it.

F. Hellendall

Tort—Master and Servant—Voluntary Acceptance of Risk by Servant

In *Bowater* v. *Mayor, Aldermen, and Burgesses of the Borough of Rowley Regis*, [1944] 1 K.B. 476, the plaintiff, who was employed as a dustman by the Defendant Corporation, was held by the Court of Appeal not to be barred from recovering damages for negligence at Common Law merely because he continued under protest to drive an unruly horse whose propensities which caused him injury were well known to him as well as to the Borough Surveyor; for, in order that the maxim *volenti non fit injuria* should apply, it must be shown, to quote from Goddard, L.J., as he then was, [1944] 1 K.B. 481, "that a servant who is asked or required to use dangerous plant is a volunteer in the fullest sense, that, knowing of the danger, he expressly or impliedly said that he would do the job at his own risk and not at that of his master."

The identity on all material points of the facts of this case with those of *Yarmouth* v. *France* (1887), 19 Q.B.D. 647, may seem to be an inadequate reason for commenting upon it; but the fact that in that case the plaintiff brought his action under the Employer's Liability Act, 1880, with the attendant drawback of the limitation of damages recoverable to £300, suggests that the law on the applicability of the *maxim volenti non fit injuria* and cognate doctrines to the case of master and servant has undergone change since it was decided. The words at the end of Sect. 1 of the Act of 1880, which in effect give the workman in the cases specified in the section the same rights and remedies against the employer as if he were not the workman of the employer, were in fact treated as vital to the plaintiff's success. Thus, Lord Esher said (19 Q.B.D., at p. 651), "under the old law it would have been said, you, the servant, have entered into or continued

in this employment where this thing of which you complain is open and palpable and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer. The *maxim volenti non fit injuria* was not wanted as between master and servant." Had he desired to do so he could have cited in support of this view of the old law the decision of the Court of Appeal of which he was a member in *Griffiths* v. *London and St. Catherine's Dock*, 13 Q.B.D. 259, to the effect that, in actions by a servant against a master in respect of the dangerous condition of his premises, the Statement of Claim must allege not only that the master knew but also that the servant was ignorant of the danger. "The knowledge of the master and the want of knowledge of the servant make together a cause of action." (13 Q.B.D., at p. 260.) After the decision of the House of Lords in *Smith* v. *Baker*, [1891] A.C. 325, however, in which it was said that the master's ignorance of the danger would not have barred the workman's claim at Common Law, as he was bound to see that his machinery and works were free from defect, ([1891] A.C., at p. 356), and which decided that the servant's knowledge of the danger was no more than evidence of his acceptance of the risk of injury, it is legitimate, so far as the judgments are concerned (on the facts Lord Wright appears to think that the case may be treated as one of casual negligence for which the master is not liable in the absence of knowledge ([1938] A.C., at p. 84)) to treat *Griffiths'* case (*supra*) as one of merely historical interest. Indeed, McCardie, J., treated it in this way in *Baker* v. *James*, [1921] 2 K.B. 674, in which he held that a commercial traveller was entitled to recover damages from his employers for their negligence in permitting him to use a car with a defective starter of which he was well aware and of which he had frequently complained.

The rule which the Court of Appeal purported to lay down in *Griffiths'* case (*supra*) was, of course, a rule of law, and had it not been impliedly overruled by the judgments of the House of Lords in *Smith* v. *Baker* (*supra*), it would have operated much more harshly on servants situated like the plaintiff in *Bowater's* case than the rule, which was at one time thought to exist and which was also put to rest in *Smith* v. *Baker* (*supra*), that the applicability of the maxim *volenti non fit injuria* was a question of law, because it would have barred many actions in limine. The quotation from Goddard, L.J., cited at the beginning of this note, however, affords another illustration of the principle that the acceptance of risk by the plaintiff is always a question of fact. Furthermore, Scott, L.J., said ([1944] 1 K.B. 479) that "a man cannot be said to be truly willing unless he is in a position to choose freely and freedom of choice predicates not only full knowledge of the circumstances upon which the exercise of choice is conditioned in order that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will." This remark not only justifies the doubts expressed by him, as well as by Goddard, L.J., as to the applicability of the maxim *volenti non fit injuria* in circumstances of an injury to a servant by the negligence of his master, but also shows how in the course of the last fifty years the Courts have come to adopt a more realistic approach than heretofore to the relation of master and servant so far as one of the old maxims of the Common Law is concerned.

Unfortunately it is now impossible for the Courts to do this in the case of the doctrine of common employment, because, in contrast with the

maxim *volenti non fit injuria* it has come to be treated as a presumption of law having nothing to do with the actual acceptance of risk of the negligence of a fellow servant. (It is significant in this connection that in *Griffiths'* case (*supra*) the Court of Appeal relied on *Priestley* v. *Fowler* (1837), 3 M. & W. 1, in which the doctrine of common employment is said to have originated). Accordingly in *Alexander* v. *Tredegar Iron and Coal Co.*, [1944] 1 K.B. 390, the Court of Appeal held that the doctrine applied to a servant affected by the Essential Works Order, although he had no freedom of choice so far as the continuance in his master's employment was concerned. However, Scott, L.J.'s dictum has already borne fruit in that it enabled Cassells, J., to hold in *Read* v. *Lyon*, [1944] 2 A.E.R. 98, that the maxim *volenti non fit injuria* cannot be relied on by the employer as a defence to an action brought by an employee who was directed to work for him against her will by an official of the Ministry of Labour.

In this case the plaintiff was injured by an explosion while working in the defendants' explosive factory. There was no evidence of negligence, so that, assuming that Cassells, J., was correct in holding that the facts came within the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 (his judgment on this point is criticised in 60 L.Q.R. 207, and has, since the above was written, been reversed by the Court of Appeal, 61 T.L.R. 148), the remark of Goddard, L.J., in *Bowater's* case ([1944] 1 K.B. 476, at p. 481), that a man in an explosive factory must take the risk of an explosion occurring in spite of the observance and provision of all statutory regulations and safeguards, would have applied, so far as the maxim *volenti non fit injuria* is concerned, to an ordinary case of master and servant. Justification for the application of the doctrine to such facts can be found in the probable receipt by the servant of high pay for his risky work, but it may seem to some to be anomalous that the doctrine should apply in cases of a breach of a master's strict Common Law duty, whereas it does not apply to a breach of his statutory duty (*Wheeler* v. *New Merton Board Mills*, [1933] 2 K.B. 669). In the last-mentioned case the servant has no cause of action if his contributory negligence is held to have caused the accident (*Lewis* v. *Denye*, [1940] A.C. 921), but he does not lose his right of action if he has expressly or by implication contracted out of his statutory rights. Sociologically it may be desirable to hold for reasons of public policy that he cannot do this, but, if this was the ground of the decision in *Baddeley* v. *Granville*, 19 Q.B.D. 423, which was followed in *Wheeler's* case (*supra*) simply because of its long standing, a lawyer may share with Scrutton, L.J., ([1933] 2 K.B., at p. 691) the wish that it had been more clearly stated for it is a drastic extension of the doctrine of public policy which does not seem to have received sufficient attention.

RUPERT CROSS

Effect of the German Denationalization Decree of November 25th, 1941

In my article on Denationalization (6 MOD. L. REV. 57), I considered the question whether German nationals of Jewish descent now residing in this country who had been deprived of their German nationality by the German Decree of 25th November, 1941, were outside the frontiers of Germany to be treated as stateless. This question, which had never before been expressly decided by a British Court, has been answered on 26th July, 1944, by a Divisional Court (Viscount Caldecote, L.C.J., Humphreys and

Wrottesley, J.J.), as reported in [1945] 1 K.B. 7.[1] The statement of facts in the report commences by saying that "the applicants were at one time Austrian nationals, but became German nationals in consequence of a German Decree of 3rd July, 1938, the effect of which was recognised by His Majesty's Government,[2] and, therefore, when war broke out, they became enemy aliens as subjects of Germany." The Decree of 3rd July, 1938, abolished Austrian nationality and replaced it by German nationality. The applicants, who are of Jewish faith, left Austria in 1938, obviously after her occupation by Germany, went to France and remained there until 1941, when they decided to go to South America by a ship which sailed to South America via Port-of-Spain in Trinidad. When the ship reached Port-of-Spain an Order of Detention was made in respect of them and they were brought to the United Kingdom and were interned. They disputed the lawfulness of the Order of Detention, taking the view that they had been deprived of their German nationality by the Decree of 25th November, 1941, and applied for a writ of habeas corpus. The applicants conceded that they were enemy aliens when the war broke out, and they did not dispute that enemy aliens were not in a position to move for a writ of habeas corpus. The decisive question, therefore, was whether the applicants had retained their status of enemy aliens notwithstanding the German Decree of 25th November, 1941, and were, consequently, not entitled to apply for such a writ, or whether they had become stateless and, therefore, entitled thereto. The Court refused the motion.

Viscount Caldecote, L.C.J., delivering the judgment of the Court, referred to the admission by the applicants that they were enemy aliens when war broke out, and said: "If effect must be given to the German Decree, so as to deprive these people of their German nationality and to make them stateless, they would, of course, no longer be enemy aliens and they would not come under the disabilities which fall on enemy aliens." After reviewing two authorities, His Lordship considered whether "an enemy alien can throw off his disability by relying on a German law which, in time of war, purported to change his status from of an enemy alien to that of a stateless person." "My reply is," His Lordship continued, "that such changes of nationality are not recognised for very obvious reasons. If such changes were to be permitted in times of war, enemy agents might acquire facilities which could be used in a way very much to the prejudice of this country. It was pointed out in *Liebmann's* case[3] that war is waged nowadays not only by armies in the field, but by agents in the heart of the enemy country, and to recognise changes of nationality in time of war, which might operate to the prejudice of this country, is to do something which, if it is necessary to put it on the ground of public policy, ought not to be done. I have, therefore, no hesitation in saying that the change of nationality relied upon by the applicants as entitling them to make this application is one which these courts will not recognize." In view of the fact that "there was an impediment at the very outset of the applicants' motion," viz. that they were not in a position to apply for a writ of habeas corpus, His Lordship arrived, with the concurrence of the two other learned Judges, at the conclusion that the application should be dismissed. As I was informed, no appeal was lodged against this decision.

[1] *In re The King* v. *The Home Secretary. Ex parte L. and another.*

[2] The report does not state by which act, express or implied, such recognition was effected.

[3] [1916] 1 K.B.268.

The decision might give rise to the following brief remarks: 1. The Court was obviously led by the principle recognised in international law that it is at present left to the discretion of each State to determine on which grounds nationality is acquired and on which grounds it is lost[4]. The Court did not go as far as Dicey[5] who maintains that disabilities arising from religious vows or religious belief imposed in foreign countries are not to be recognised by British Courts. But the Court held that the above principle did not apply if it contradicted public policy. And the Court ruled that it was against public policy to recognize any change of nationality brought about by a decree of an enemy State enacted in time of war which purports to turn any of its nationals into the status of a stateless person. Denationalization brought about by peace time legislation of a foreign State, as, for instance, by the German statute of 14th July, 1933, would, therefore, be recognized in this country. This seems to be in accordance with the view taken by the United States Circuit Court of Appeals in the *Schwarzkopf* case. The District Court of the United States for the Southern District of New York, in dismissing Schwarzkopf's application for a writ of habeas corpus, had expressed the opinion that it could not be incumbent on U.S. Courts to set Germans who had been interned free merely because Germany had passed a law depriving German refugees of their nationality. The United States Circuit Court of Appeals reversed this decision on 18th August, 1943.[6] The Court held in the first place that the applicant who had left Austria before her occupation had not become a German national, but the Court added: "If we were to deny the relator the right of election and were to look solely to German law to determine his status, he would not be a German citizen. If it be assumed that he acquired German citizenship by the annexation of Austria and the decree of 3rd July, 1938, such citizenship was lost under German law in November, 1941. There is no public policy of this country to preclude an American court from recognizing the power of Germany to disclaim Schwarzkopf as a German citizen." It must be noted that the Decree of November, 1941, was enacted before the United States entered into war with Germany (11th December, 1941). It is an open question whether the New York Court would have taken the same view if the German Decree had been enacted after that latter date.

2. Mr. Howard says in his book on "Trading with the Enemy,"[7] although without referring to any authority, that "the English Courts do not recognize as valid any legislation of enemy governments during war-time." This is obviously not the standpoint of the Divisional Court. It will have to be considered in every case whether the application of such a legislative act contradicts public policy.

3. Another question which may be raised is as to whether persons to whom the German Decree of November, 1941, applies are to be considered as having retained their German nationality in all respects or only in so far as they are subjected to disabilities because of their status as enemy aliens. I would submit that this question is to be answered in the latter sense. This is of importance, e.g., in view of the provision in

[4] See the authorities quoted in my article, *loc. cit.*, p. 63, notes 12 and 13.

[5] See the above article, p.67, note 38.

[6] *Paul Schwarzkopf* v. *Byron H.Uhl*, 137 F. 2d-No. 7, *New York Law Journal*, 25th September, 1943. See E. Borchard, *American Journal of International Law*, October 1943, p. 634.

[7] F. C. Howard, M.A., "Trading with the Enemy." Butterworth's Emergency Legislation Service, Statutes Supplement No. 22, p. 83.

section 10 (2) of the British Nationality and Status of Aliens Act, 1914, as amended, under which a woman who has "married an alien, and was at the time of her marriage a British subject, shall not, by reason only of her marriage, be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband." A British woman who marries a German national to whom the Decree of 1941 applies would, therefore, not lose her British nationality because she has married a stateless person. But, in my submission, the result would be the same if the husband were deemed to be a German national; for the question whether the wife acquires the nationality of her husband, i.e. the German nationality, can be answered only according to German law; and it cannot be said that she has acquired under German law German nationality because from the point of view of German law her husband has lost his German nationality.

4. A rather striking feature of the case under review is, to my mind, that the applicants as Austrians do not seem to have challenged the validity of the German Decree of 3rd July, 1938, on the ground that Austria is an occupied and not a *de jure* annexed country, and that they do not appear to have raised the question whether they have become German nationals at all or whether they were to be deemed to be Austrians. I do not propose to deal in this note *ex professo* with the intricate question of Austrian nationality, but I would like to refer to a decision of the Patents Appeal Tribunal delivered on 18th March, 1943,[8] which deals with the problem of Austrian nationality, although in a restricted sense only. An applicant had described himself in his patent application as "of Austrian nationality." The Superintending Examiner notified him that his application could only be accepted if he were described on the application forms as "of German nationality" or "of no nationality, formerly Austrian." The applicant appealed to the Patents Appeal Tribunal. Mr. Justice Morton—as he then was—allowed the appeal. His Lordship reviewed statements made in the House of Commons by the Secretary of State for Foreign Affairs, Mr. Eden, on 9th September, 1942, and by Viscount Cranborne in the House of Lords on 2nd February, 1943, with regard to Austria, and said: "It does not seem to me that I have to determine in this case the nationality of this applicant. I have only to decide whether in an application for a patent it is open to the applicant to describe himself as being of Austrian nationality. In my view, having regard to the statements of the present attitude of the Government which I have read, it is right to say that anyone who was, immediately prior to the 11th March, 1938, a person of Austrian nationality, and who has not since that date voluntarily changed his nationality, is entitled to describe himself as of Austrian nationality on an application for a patent. I think that is enough to dispose of this appeal. I am not conducting an inquiry into the nationality of this applicant, and in my view the words of Austrian nationality are words which can be properly inserted on the form of application for a patent." The conclusion arrived at by Mr. Justice Morton would now seem to derive additional support from the statement contained in the Moscow Declaration of 1st November, 1943, regarding Austria. If the applicants had chosen to plead the case before the Divisional Court in that direction, this might have been an opportunity of obtaining an express judicial decision on the question of Austrian nationality.

PAUL ABEL

[8] LXI, Reports of Patent, Design, and Trade Mark Cases, p. 89.

Trade Debts as Component of Taxable Profits

The profits of a trade are charged to income tax upon "the full amount of the balance of profits and gains"—Rule 1, Case I, Schedule D, Income Tax Act, 1918—but the Acts are silent as to how the profits are to be computed or what sums may be included in the *gross* incomings, though specific directions are given as to the kind of expenses which are forbidden to be set against those incomings. In default, the Courts have applied their own interpretation to the above phrase and have repeatedly held that ordinary commercial principles must be employed subject, of course, to the express provisions of the Acts regarding inadmissible deductions, cf. Lord Parmoor in *Ushers Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433, viz., "The balance of profits and gains is struck by setting against the receipts all expenditure incidental to the trade which is necessary to earn them and by applying in the computation *the ordinary principles of commercial trading*."

In *Absalom* v. *Talbot* (1944), 1 All E.R. 642, the House of Lords was, for the first time in the hundred years' history of our present income tax, faced with the problem whether—in computing the profits of a business for a given year—debts incurred in respect of sales made in that year, *but paid or payable in subsequent years*, could properly be included among the gross receipts of the business for such year. Strangely enough the point has not often been considered by the lower courts, but in the instant case, Scott, L.J.—dissenting—had held, upon an historical review of the Income Tax Acts, that debts had never expressly been brought into charge as an ingredient of trade profits; he considered, therefore, that the only debts which should be taken into account were those due for payment in the basic year upon the profits of which the assessment was made. Against this view we may set the opinion of Rowlatt, J., in *The Naval Colliery Co., Ltd.* v. *Inland Revenue* (1926), 136 L.T. 28, that "Receipts include debts due . . ." and that of Lord Sands in *Dailuaine-Talisker Distilleries, Ltd.* v. *Inland Revenue* (1930), S.L.T. 553, viz.: "If there is a book debt . . . standing in the books of the business, this falls to be taken into account in estimating the profits of the year."

The facts in *Absalom* v. *Talbot* are rather involved, but, briefly, the appellant was a speculative builder who sold houses to members of the working classes for a small cash deposit, the bulk of the remainder of the purchase money being advanced to the purchaser by a building society, while the balance was to be paid by him, with interest, over a period of some twenty years, the security being a promissory note or second mortgage. The Appeal Commissioners had rejected the appellant's claim that the portion of the debt represented by the second mortgage, etc., should be valued at its *real* value at the time of sale, and not at its face value or, alternatively, that only the instalments actually receivable in the year of sale should be included in the receipts for that year. It was held, and approved by the Court of Appeal, that on the granting of the second mortgage, etc., a trade debt had been created which fell wholly to be included as a receipt of the year of sale. It should be observed that, as the appellant had ceased to trade within the next year or so, no allowance could be made to him under Rule 3 (1) of the Rules relating to Cases I and II, Schedule D, Income Tax Act, 1918, viz. for "bad debts . . . or doubtful debts to the extent they are respectively estimated to be bad." Though, by a majority of three to two, the lower court's decision was reversed on the rather exceptional facts of the case, the minority joined with Lords Atkin and

Thankerton in laying down general principles as to the relation of trade debts to taxable receipts which may be regarded as concluding the controversy. It was unanimously held, Lord Russell doubting, that normal commercial and accountancy practice should be followed, cf. *Ushers'* case *supra*, viz. that where a sale is made on conditions of *ordinary* commercial credit, the debt created is properly regarded as includable in the receipts of the year in which the sale took place. The majority considered, however, that the facts in *Absalom's* case were of a very unusual character, since it was quite outside the scope of ordinary commercial credit for *a member of the working classes* to be allowed twenty years in which to pay a "trade" debt he had incurred; money to be paid so far ahead could not be wholly regarded as a profit of the year in which the debt was created—*é contra* where the debtor's credit was impeccable. In such circumstances the correct method was to make a valuation of the debt with due regard to the possibility of default over the period of payment, and the case was accordingly remitted to the Appeal Commissioners for such a valuation. It should be noted, however, that in view of the fact that interest was to be paid over the period of liquidation of the debt, this valuation was not the equivalent of arriving at the present value of a sum to be paid *in futuro*.

As a result of the course this case took in the lower courts, it was unanimously held that the inclusion of debts in "annual profits and gains" proceeded not from the statutory allowance for bad debts, but resulted from an application of "ordinary commercial principles," cf. *Ushers'* case *supra*. The House of Lords also took into consideration the extent to which the decision of the Judicial Committee in *Gleaner & Co., Ltd.* v. *Assessment Committee of Jamaica*, [1922] A.C. 169, was good law in this country. In that case, upon provisions in a Jamaican Income Tax statute as to a deduction for bad and doubtful debts which were identical in terms to those in our income tax code—cf. Rule 3 (i), Cases I and II, Schedule D *supra*—it had been held that the allowance for bad debts could only be set against the profits of the year *in which the debt was incurred* and provided they were proved actually to be bad in such year; the practice of the British Income Tax Authorities of granting an allowance for debts proved to be bad in a year subsequent to that in which they incurred was held to be without statutory authority and purely concessional. A majority of the Law Lords held specifically that the rule laid down in the *Gleaner* case was not an authority on British income tax law, and that the practice of our Inland Revenue Department was in accord with statutory requirements and was not merely benevolent.

A. Farnsworth

When Does the Right to a Dividend Arise?

Associated Insulation Products, Ltd. v. *Golder* (1944), 2 All. E.R. 203, though a tax case, is of general interest in that it lays down the law that a shareholder's right to a distribution of a company's income arises not when a dividend is declared but when in fact it becomes payable. The appellant company held stock in an American corporation which had, in 1936, considerable profits available for distribution to its stockholders, but its liquid assets were inadequate to enable a present payment to be made. Accordingly a resolution was passed in that year declaring a distribution of 7 per cent on its capital stock payable at the date of the resolution, *but providing* that the distribution should be payable in the form of certificates

of indebtedness payable on 1st January, 1940, with interest meantime, the certificates were negotiable instruments and had a current money's worth, while the corporation reserved therein a right of prior redemption; a similar resolution, *mutatis mutandis*, was passed the following year in respect of that year's surplus. The appellant's main argument was that the issue of the certificates represented a receipt by them of income in the form of money's worth which was chargeable to tax at the date of their issue and not at redemption; the very great increase in the rates of British income tax between 1936 and 1940 was, of course, the reason for this contention.

The Court of Appeal held unanimously that income from the distribution did not arise until the certificates became payable. Scott, L.J., was of the opinion that the substance of the transaction was the declaration of a money dividend payable not presently but upon a future date. The other Lords Justices held themselves concluded by the Court's earlier decision in *Cross* v. *London and Provincial Trust, Ltd*, [1938] 1 K.B. 792; in that case it had been held that the issue of funding bonds in respect of interest which had fallen into arrear was neither a payment of the interest nor a receipt of income so that no charge to income tax could be made on the value of the bonds. "A promise to pay a debt is not payment thereof," so that the issue of a postdated cheque or a promissory note in respect of a pre-existing liability could not be "income," though it might represent "money's worth"; applying this rule to the instant case, it was held that no taxable income arose to the stockholders of the American corporation until their certificates of indebtedness were in fact redeemed. It should be noted that the rule in *Cross'* case has been abrogated for income tax purposes by Sect. 25, Finance Act, 1938, but only as regards funding bonds issued in respect of liability to pay *interest*.

A. Farnsworth

REVIEWS

ENGLISH COURTS OF LAW. By H. G. Hanbury, D.C.L., 1944. Oxford University Press. **3s. 6d.** net.

It is difficult to tell from a perusal of this book what public Dr. Hanbury had in mind when writing it. The Home University Library is commonly supposed to be intended for the general reader; a more than usually well educated general reader it is true, but still a general reader. I wonder how many such readers will make head or tail of his volume.

Dr. Hanbury's scholarship is well known, and his style is one of the most attractive of contemporary English writers on law. But scholarship requires to be used with discretion when one is writing for the uninitiated, and when lucidity is an essential epigrammatic antitheses are apt to cause fog rather than enlightenment. Is it really necessary, for example, in an elementary work on the English Courts, to embark upon an elaborate description of feudal tenure "with its four free tenures of frankalmoign, chivalry, serjeantry and socage"? While to state that in England "we live in law under a despotism" is no doubt an excellent opening gambit to obtain a fast and furious discussion in a society of constitutional lawyers, but does it help the general reader to get a clear idea of anything?

It is true, however, that the publisher's "blurb" describes the book as "an attempt to show the historical background of the Courts." One may doubt whether there are many general readers who want to attempt

a background very largely painted in the colours of medieval legal history, but for some students of law, anxious to obtain a bird's eye view of our legal history, the book may prove useful. It contains a wealth of quotations, many ripe (and a few unripe) *obiter dicta*, and a substantial amount of useful historical material, as well about the law, as about the Courts which administer it.

Dr. Hanbury does, however, appear to be aiming at the general reader, because he very properly starts off with what purports to be an elementary account of the material upon which the Courts work. The picture is, however, rather confused, not to say confusing; confused because of the absence of a logical build-up, confusing because of an assumption of knowledge on the part of the reader which he is unlikely to have, unless he is a legal student; in which case the chapter is unnecessary. Technical terms are used, as contract, tort, waive, without explanation. Statements are made, which, unless explained at some length, are bound to mislead; as "the other great branch of public law which we in Britain call constitutional, and the Americans tend to call administrative law." Reading this one might think that constitutional and administrative law are really the same thing, or alternatively that in England we have not got a system of administrative law proper at all.[1]

There are in this first chapter too, some rather tall statements; as that the members of the House of Lords, since they are not representative members of Parliament, are able, in contrast with the Commons, to take a dispassionate view of the matters which come before them. Why should the fact that the peers are not *elected* representatives of the industrial, commercial, financial, and landowning interests which they in fact protect, result in their being dispassionate? However, the general reader can no doubt look after himself in this country.

Dr. Hanbury then gets down to his subject with historical enthusiasm, so much so that out of a total of 182 pages he devotes 20 to the Courts and legal system of Henry II, all but another 20 to the thirteenth century, and a third 20 to getting himself down to modern times. There is much of great interest in these chapters, but it is rather complicated for a general reader who cannot be expected to follow, and enjoy, the exciting controversies about its *consimili casu*, with Professor Plucknett as champion on one side, and Mr. P. A. Landon on the other.

We have now arrived at Chapter IV, with but a little more than half the book left to go, and the heading "The Courts of Common Law" might lead the reader to hope for an account of how the King's Bench Court works, or of what goes on in County Courts. Not a bit of it; for the two chapters on Common Law Courts, and the following one on the Court of Chancery, are as solidly historical as their forerunners, and Dr. Hanbury points out, without exaggeration, that he "has taken four chapters to divest the judicial body of its legislative and executive garments." It would clearly be unbecoming to leave it unclad, and a fine outfit of historical clothing is rapidly supplied.

And so we come to modern times, with only forty pages left by the Paper Controller. Chapter VIII, is headed "The Courts of the Present Day"—it is a little shorter than that devoted to the time of Henry II! Here, of eight pages given to Criminal Courts, specially mentioned in the "blurb," very nearly half are devoted to praise of the justices of the

[1] It is true that at the end of his book Dr. Hanbury says something about administrative law proper.

peace, and half of these are again historical. Did Dr. Hanbury's tongue steal into his cheek when he penned the line, "on rare occasions an individual justice . . . will arouse public criticism"? Incidentally it is wrong to say that the clerk, whose importance is rightly emphasized, must be a lawyer, and I have never before heard the fact that so few boroughs have applied for a stipendiary, turned into "a testimonial of the efficiency of the unpaid lay magistracy": economy would be nearer the mark. However, I discuss the problem of the lay magistrate elsewhere.[2]

The jurisdiction of the magistrates' Court which some might think the essential thing about them is knocked off in about a page; Dr. Hanbury remarking that "the matter is too detailed for exhaustive description." And yet he discusses the writ of right on no fewer than four pages and in his main discussion of it allocates just twice the space which he gives to the magistrates Court, in some ways the most important Court at present working in England.

It is characteristic that the Juvenile Court, one of the most significant experiments in the modern administration of criminal law, receives just five lines, one of which is taken up with the observation "present space admits no details" of the special rules of procedure observed in these Courts; though the Court of Star Chamber is discussed for more than three pages.

What does Dr. Hanbury mean by "rare" when he so describes the cases when prosecutions for indictable offences are dismissed as "occasions necessarily rare owing to the high level of competency among English police"? In my experience such cases are not uncommon.

The discussion of the present-day Civil Courts is equally sketchy. The jurisdiction of the County Court is dismissed with the remark that it "is limited by the amount of the sum in dispute . . . £300 represents an average figure," a remarkable statement, because that figure is, generally speaking, the limit of their jurisdiction. If Dr. Hanbury will spend a day in the Oxford County Court, I shall be surprised if the average amount in dispute is as much as one fifth of this sum. However, that is a small point. Here we have a Court which for the volume of its work, and the number of citizens whose lives it affects can claim to be the most important of all our Civil Courts, dismissed in so few, poor lines.

Even the organisation of the High Court receives only slightly more extended treatment. And when he comes to the Judicature Act, certainly a landmark in the history of our Civil Courts, Dr. Hanbury's historical sense seems to desert him, for he makes no attempt to analyse or discuss it.

On page 158, we are told that the process of taking over the law merchant into the common law was started by Lord Mansfield, though fifty years earlier Lord Holt was already at work. But we are in fact told very little about the Courts administering the law merchant: after all, this country was for centuries the leading mercantile state and is still in the forefront.

Dr. Hanbury closes with two chapters on "The Judges in the Constitution" and Barristers and Solicitors. These are certainly justified on a reasonable view of the scope of the book. Both are very eulogistic—the historical process which we have followed has led us into the best of all possible worlds, and "I am sure that you'll agree that all is right; as right can be."

[2] *supra*, p. 1.

The picture of the Lord Chancellor, "above the combat" making, or rather "advising" appointments to the bench on purely legal grounds, and never yielding to political pressure—"what never? well, hardly ever"—can only be described as picture-postcardy.[3] The situation has certainly improved of recent years, but Dr. Hanbury should make a list of the M.P's. and candidates who have been made judges since 1900—its length will suprise him.

In this chapter there is a section entitled "the relation of the Court to quasi judicial and administrative powers," in which Dr. Hanbury takes a "fleeting glance" at administrative law. He has admittedly set himself an impossible task in the attempt to deal with this peculiarly intractable subject in half-a-dozen pages. In the result he provides what can only be described as a series of superficial and misleading dicta, which the reader must be advised to treat with caution.

Dr. Hanbury has really fallen between two stools. He has concentrated so much on the history that he has not made a serious attempt to describe the Court system as it is functioning to-day. Having decided on history, it would probably have been better if he had confined his attention to that aspect and abandoned the attempt to paint the complicated picture which exists to-day with such a thin palette.

R. S. T. C.

LEGAL EFFECTS OF WAR. By Sir A. D. McNair, pp. xx, and 416 (with index) Cambridge: The University Press, **25s.** net.

Curiously the war of 1914–18, brought forth few studies on its legal effects, though the case law was voluminous and of the first importance. Among such as there were, a slim volume by Dr. A. D. McNair, appearing after the war had terminated, but before the litigation occasioned thereby had ceased, attracted a good deal of attention, and was well thought of.

The present volume may perhaps be regarded technically as a second edition, but in reality it is a new work, and one which will inevitably increase the already high reputation of the author. Other works covering much of the same ground appeared early in the war, and are not without merit.[1] Sir Arnold McNair has preferred to take his time—parenthetically it is a remarkable fact the that author of the McNair Report, and member of other Government Committees, can find any time to take. In the result he has produced a treatise which is likely to become the leading authority upon its subject.

After a short chapter on the meaning of war, Sir Arnold gives a brilliant summary of the law relating to British nationality. There is a remarkable absence of modern or indeed of any comprehensive study on this subject. Apart from the statutes, the valuable commentaries in Dicey's Conflict of Laws, and the useful section in the Laws of England, most of the literature on the subject consists of articles in learned periodicals. Decisions on concrete cases are given administratively by the Home Secretary in the great majority of cases, and though these have no binding effect they are seldom challenged in the Courts, since the persons concerned are apt to be of poor financial standing. The number of cases decided in the Courts is small, but in the Home Office their exists a substantial body of precedents,

[3] The remark "it cannot indeed be said that political appointments have never been made" is a masterpiece of understatement—shades of Lord Halsbury!

[1] See reviews in 3 Mod. L. Rev, p. 233.

many of them fortified by opinions of law officers, making an important volume of jurisprudence. Practitioners are very much in the dark about this (although a few firms of solicitors may have built up a fair expertise), and find it somewhat difficult to advise in complicated cases with confidence. It is high time that an authoritative work on the subject should be available, and it is to be hoped that the Home Office will make its files, or at any rate the decisions contained therein, available to some well credentialed author.

Meanwhile the exposition of the British Nationality and Status of Aliens Act, 1914, and the amending statutes contained in this volume is likely to be much used, and to form a basis for further studies. Sir Arnold compresses a vast amount of learning into the seventeen pages which he devotes to the subject, but naturally he deals only with the bare bones. He has perforce to leave out the historical side almost completely. It is difficult to see how this could be avoided, though in practise the number of cases which involve application of the law as it existed before 1914, is quite substantial and researches into the pre-1870, position are not infrequently necessary.

Included in this chapter are short sections on German Nationality, Alien Status, and Statelessness. It is hard to credit the fact that the condition of statelessness was not recognised by our Courts until 1921.[2] The practical importance of this status in modern time is indicated, but not very much explanation is given, especially of the ways in which it arises, which are interesting and important.

The long chapter on the Procedural Status of Aliens is a masterly and lucid statement of the law. Sir Arnold makes what I have always considered a particularly complicated subject so clear that I have an uneasy feeling that there must be a snag in it somewhere!

Two chapters, among the most important in the book, are devoted to a consideration of the effect of war on contracts, in general terms. After which the more important types of commercial contracts are dealt with in turn; -affreightment, agency, negotiable instruments and building (together with shipbuilding) contracts, which are considered together, for some unexplained reason, in the same chapter, employment, insurance, sale of goods and solicitors retainers. Mixed up with these are chapters on companies, and leases and tenancies and partnership, (again the bed fellows are curiously assorted). The ordering of these chapters is not very logical and some of them are rather slight and detract somewhat from the otherwise high level of the volume: but, of course, there is often little concrete material available.

In his chapter on the general principles relating to the effect of war on contracts, Sir Arnold is concerned chiefly with two matters (*a*) the effect of the outbreak of war on existing contracts whether executory, or partly executed, (*b*) the effect of war upon rights which had occured from breaches of contract occuring before the outbreak of war. His powers of logical analysis are at their best here, and these sections richly repay perusal- incidentally there is a serious misprint at p. 97, where "the law governing the country" should be "the law governing the contract." Although he is somewhat cautious in expressing his own views about doubtful points, Sir Arnold is on occasion ready to do so, and his essentially liberal outlook then invariably appears, as when at p. 121 he says that

[2] *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67.

"it is inconceivable that upon the outbreak of war an English banker's obligation toward an enemy customer is *ipso facto* destroyed."

The second chapter on Contract is concerned with the important topic of frustration. Here again the analysis is masterly. Sir Arnold shows how the law derives from two sources, the one *Taylor* v. *Caldwell*[3] the other the law merchant which had developed a practical approach to the subject of frustration much earlier, though one hardly begins to find a juristic approach till 1874.[4] One wonders whether these two sources of origin are really so distinct. Blackburn, J., was certainly "a master of the common law," but he was equally a master of the law merchant. The common law masters had been applying the doctrine of *Paradine* v. *Jane* in a rigid, and particularly unhelpful way for two hundred years when Blackburn suddenly made his important departure, and although they were later, it is interesting to note that he was a party to the decisions in the important mercantile cases of *Geipel* v. *Smith*[5] and *Jackson* v. *Union Marine Insurance Co.*[6]

As Sir Arnold points out, there is no logical connection between the *Taylor* v. *Caldwell* type of case with its actual impossibility and the commercial frustration type of case, when performance is physically possible but to insist upon it would be commercially unreasonable. They can be connected, however, by the theory of an implied term, causing dissolution in the circumstances supervening, and in this way during the war of 1914–18 the two streams of authority coalesced.

Supervening illegality may be taken to terminate a contract by virtue of a similar implied term, but Sir Arnold deplores "the growing tendency to include impossibility arising from supervening illegality within the conception and terminology of frustration." Why, he does not make clear. There seems to be a good deal to be said for aiming at some degree of homogeneity in such a difficult subject.

A careful analysis of the various possible theories underlying the doctrine of frustration follows. I have discussed the matter from time to time in notes contributed to this journal, but I agree reluctantly with Sir Arnold, that the theory of the tacit term has since *Joseph Constantine Steamship Line* v. *Imperial Smelting Corporation*,[7] too great a weight of authority behind it for any other still to hold the field.

When so much has been written it is possibly wise of Sir Arnold to ignore the literature, but I think that rather more use (especially in connection with the effects of frustration) might have been made of McElroy and of the various notes contributed by Dr. Glanvill Williams to this journal, particularly on the Law Reform, (Frustrated Contracts) Act, 1943. Further, his opinion that Lord Wright inserted a third theory to explain frustration (originally advanced in 56 L.Q.R. at 180) was convincingly challenged by Mr. George Webber in his "Effect of War on Contract," but Sir Arnold does not notice his argument, nor does he discuss the U.S.A. authorities.

There is a good, if rather compressed, chapter on Trading with the Enemy, which contains a useful note criticising the case of *R. and A. Konstamm, Ltd.* v. *Ludwig Krumm (London) Ltd.*[8] There are two

[3] (1863), 3 B and S. 826.
[4] In *The Union Marine Insurance* case.
[5] (1872) L.R. 7, Q.B. 404.
[6] (1873) L.R. 8, C.P. 572.
[7] [1942] A.C. 154: see 5 MOD. L. REV., 141.
[8] [1940] 2 K.B. 359.

chapters on the Effects of Belligerent Occupation of Territory. Here we are in the demesne of International Law, and the reviewer is not competent to express an opinion on the interesting views expressed. The second of them, which deals with the position of the dispossessed governments, opens up a topic which as Sir Arnold points out, is almost *res integra* in England, and it will no doubt be regarded as all the more valuable for that reason.

R. S. T. C.

NEW HORIZONS IN CRIMINOLOGY. By Harry Elmer Barnes and Negley K. Teeters, Temple University, Philadelphia. New York, Prentice-Hall, Inc., 1943. xxvi and 1069 pp. **$4.50.**

This book by two well-known professors of Temple University, Philadelphia, is something like a cross between a textbook, an encyclopaedia, and a collection of critical essays. It combines the specific merits of all of them without sharing their weaknesses, which means that it is at the same time systematic, comprehensive, challenging and thought-provoking. While, naturally enough, the material is mainly drawn from American sources, European literature is so widely and skilfully used that the book will be of great advantage to readers outside the U.S.A., as well. The authors being sociologists, their approach to the crime problem is largely sociological, and it is in this sphere that they make their most valuable and original contributions. Although it is clearly impossible, within the scope of a short review, to sum up all the "new horizons" opened up by the authors, attention may be drawn at least to a few of them:

There is first the general shifting of emphasis from the poverty factor as a cause of crime to other much more complex explanations. The authors have the courage to express what many others have been feeling for a long time, i.e., that the machinery of criminal justice is largely out of date, having failed to adjust itself to the changes in anti-social behaviour that have occurred within the past fifty years. Criminal justice is still occupied almost exclusively with the small fry of lawbreakers whose offences may be explained in terms of poverty, unemployment, and the like, instead of concentrating on the much more dangerous "white-collar criminal." The brilliant analysis of this type, to which the first part of the book is largely devoted, will repay careful study even in countries where conditions are still somewhat more favourable in this respect.

One part deals with the work of the Police and the Criminal Courts, limited of course to American conditions. It contains a devastating chapter on Trial by Jury, which culminates in the following verdict:

> "the stark reality is essentially this: a number of individuals of average or less than average ability, who could not tell the truth if they wanted to, who usually have little of the truth to tell, who are not allowed to tell even all of that, and who are frequently instructed by unscrupulous lawyers to fabricate voluminously and unblushingly, present this largely worthless, or worse than worthless information to twelve men and women who are, for the most part, unconscious of what is being divulged to them, and would be incapable of an intelligent interpretation of the information if they had actually heard it . . . the modern jury trial is one of the many anachronisms that clutter up our system of criminal jurisprudence and penal philosophy" (p. 363).

No wonder, then, that the figures given by the authors for U.S.A., Courts show the same trend away from the Jury which is so conspicuous in this country. No wonder, too, that the authors are in favour of the Treatment Tribunal idea which, they think, would make the juries less reluctant to convict as they would be more assured of efficient methods of treatment for the offender.

By far the most important chapters, however, are those dealing with questions of treatment. They are equally admirable on the factual as on the critical side. Here, the primary aim of the authors is to present an overwhelming case against institutional treatment of crime; and in this they have been entirely successful. The very considerable progress in institutional methods, whether in prisons for the adult or in reformatories and schools for the adolescent and juvenile offender, has hardly ever been described more fully and more impartially. Nevertheless, the final impression left in the mind of the reader is that, in the words of the authors, "even the New Prison must go," and "no more children's institutions should be erected." Before this stage is reached, we shall, however, have to put up with institutional methods for many years to come, and for this transitional period the fullest use should at least be made of certain progressive methods, notably in the fields of classification and education, to which the authors have devoted some of their best chapters.

Not the least valuable feature of the book are the many excellent illustrations, ranging from the Hulk "Warrior" and the Treadwheel to Alcatraz Prison, and from John Howard to William Healy. It is safe to predict that "New Horizons" will soon rank among the most popular and influential textbooks on the subject.

HERMANN MANNHEIM

A GUIDE TO JUVENILE COURT LAW. By GILBERT H. F. MUMFORD, Solicitor, Deputy Clerk to the Justices, Gravesend. London, Jordan & Sons, Ltd., 1944. 120 pp. **5s.**

It is no easy task for Juvenile Court magistrates to acquire even a rudimentary knowledge of the law which they have to administer. The structure of the Children and Young Persons Acts, of 1933 and 1938, is too unsystematic and their language too technical and obscure to be of much assistance to the layman. Even the two admirable books reviewed in 6 M.L.R. 247, do not altogether fill the existing gap, Clarke Hall and Morrison being still too technical for the beginner, while Watson's picture may be not technical enough for the J.P., who wants to make himself familiar with the elements of Juvenile Court law. Mr. Mumford's little book will therefore fill a gap. Though tantalizingly brief, it gives a clear and fairly complete survey of the principal contents of the Acts in question, including Education and Adoption Acts. It is but rarely that the author expresses his personal views or discusses general questions of policy, (e.g. pp. 38 and 44), and in view of the extreme brevity of these excursions they might perhaps better have been omitted altogether in order to avoid misunderstandings. In spite of these limitations, the book will be useful to lay magistrates provided they realize that it gives "first aid" only and is in no way intended to replace other more detailed and substantial sources of information.

HERMANN MANNHEIM

THE T.V.A. LESSONS FOR INTERNATIONAL APPLICATION. By Herman Finer. International Labour Office. Montreal, 1944. **8s.**

CONSTITUTIONAL PROVISIONS CONCERNING SOCIAL AND ECONOMIC POLICY. International Labour Office. Montreal, 1944. **20s.**

The subject-matter of Dr. Finer's book belongs to the kind of problems which increasingly demand the attention of lawyers. Even the most diehard defender of the traditional subjects of legal study must see that an increasing proportion of lawyers, not only in socialist but in capitalist states, will be absorbed in manifold public institutions where the knowledge of the law of property, contract, tort, must be blended with that of administrative law, labour relations, etc.

Apart from the absorbing interest of any detailed study of the T.V.A., one of the great social experiments of our time, the present book gives an excellent introduction to the multitude of social, economic, administrative and legal problems with which a public authority of this kind is faced. It starts with an account of the many shelved projects which preceded the establishment of the Authority as "a corporation clothed with the power of Government but possessed of the flexibility and initiative of a private enterprise," under the impact of the unparalleled economic depression which swept President Roosevelt into office. It then describes the plan underlying it, as developed gradually from the end of 1933 onwards. In the centre of the activities of T.V.A. has been the generation of electricity on a vast scale, bringing new enterprise and prosperity to the stricken valley. But the characteristic feature of T.V.A. has been its "multi-purpose" character: the control of floods, reafforestation, the fight against soil erosion, agricultural and technical training and education, the establishment of ordered and enlightened labour relations for the vast number of employees of all grades and including negroes as well as whites. The number of problems arising from all these activities is legion, for, unlike a Soviet State Trust, T.V.A. has to operate in an intensely capitalist country, in which public enterprise is watched with the greatest suspicion, the powers of the federal government are strictly limited, and labour law and policy is much less solidly established than, for example, in Great Britain. Moreover, the area of its activities comprises the territory of seven states, and a part of the U.S.A., where the relation between whites and negroes constitutes a particularly delicate problem.

As this book was written for the I.L.O., the main emphasis is on economic and social problems. Among the chapters of particular interest to the lawyer are those on the delimitation of federal powers in relation to state rights, on the legal consolidation of a settled procedure of collective bargaining, on the methods of financing the T.V.A., coupled with congressional supervision, and on the internal organisation of the Corporation, the status of its management and personnel. Many of these problems have been discussed, with reference to international public enterprise, in the present reviewer's article on International Public Corporations (6 Mod. L. R., 185 *et seq.*).

The great value of Dr. Finer's study lies in the studiedly critical and objective character of the analysis. There is no trace of any special pleading. Achievements and failures, hopes and problems are discussed soberly, and with a wealth of facts. It is perhaps this very detachedness which makes the whole story of T.V.A. all the more impressive. For after more than ten years, there can be no doubt that, in the planned application of

the immense resources of modern mankind to the taming of nature in a manner which has transformed the lives of over four million people and brought new beauty as well as prosperity to a stricken area, T.V.A. is one of the greatest achievements of our time.

The lawyer will regret that the book does not give a more detailed account of the intricate legal and constitutional problems connected with the sale of power by T.V.A. to outside consumers, and finally settled in a series of Supreme Court decisions. But the only real matter for criticism is the misleading title. For while Dr. Finer's book is a detailed and most valuable study of T.V.A. as such, a single chapter deals with the lessons for international application, and, in contrast to the rest of the book, it is rather vague and inconclusive. As an outline for a further study it is interesting, and it may be hoped that such a study will be forthcoming before long.

The collection of constitutional provisions concerning social and economic policy issued by the I.L.O. provides an interesting and rather melancholy insight into the contrast between aspirations and achievements, words and deeds. The impressive bulk of the volume is largely due to the fact that the relevant declamations, for example, of the twenty federated states of Venezuela, or twenty-eight states of Mexico are faithfully registered. Four hundred and fifty countries and other governmental units are covered altogether. The volume is designed as a supplement to the excellent International Labour Code, 1939, reviewed in 6 MODERN LAW REVIEW, 96. The former is no doubt the more important, from a practical point of view. As the Introduction points out, many of the constitutional declarations of social and economic policy of recent years "frequently err on the side of the exuberance." It is always tempting to include high sounding principles, without directly binding force, in Constitutions. The history of international labour conventions tells a much more sober tale. As a standard of international values in matters of social and labour policy, the collection is, however, valuable at the present time, when the international implementation of the principles regarding conditions of employment, social security arrangements, standards of nutrition, educational facilities, health services, etc., is an urgent practical as much as an ideological necessity.

W. FRIEDMANN

E. TABORSKY, The Czechoslovak Cause. An Account of the Problems of International Law in Relation to Czechoslovakia. London, H. F. & G. Witherby, Ltd., 1944. 158 pp. **12s. 6d.**

This book deals with the position of Czechoslovakia under the aspects of Public International Law. The learned author was one of the editors of the Czechoslovak Yearbook of International Law and had published there some time ago an article, entitled "Munich, the Vienna Arbitration and International Law." Whilst this Article was confined to the events up to the Vienna Arbitration Award of 2nd November, 1938, the present book contemplates also the later events, particularly the recognition of the Provisional Czechoslovak Government by the British Government in July, 1940, and in a postscript the Czechoslovak-Soviet Treaty of Friendship of 12th December,1943. The history of Czechoslovakia from the mutilation of the country by the Munich Agreement of 1938, the invasion and the creation of the so-called Protectorate in spring 1939, up to the present position where Czechoslovakia, recognized by the United Nations, can confidently look forward to a full restoration of her sovereignty and independence, makes pathetic reading. It is unique in so far as not only

the whole of the Czechoslovak territory, even that part which was not surrendered to Germany by the Munich Agreement, has been occupied by the German forces—in this respect the status of Czechoslovakia is similar to that of other countries whose Governments are now in exile—but as for some time there was not even a representative body that could act on behalf of Czechoslovakia. Only small remnants of sovereignty remained, and it is interesting to observe how gradually the attributes of a sovereign state were re-created. These events are to some extent parallel to those creating the Czechoslovak State in 1917 and 1918. That such an anomalous situation cannot be judged only by the standard of orthodox International Law is evident, and the author points out with much reason that the solution of the complicated legal problems cannot be based always on International Law as it exists at present, but that liberal use must be made of legal analogies and application of recognized legal principles. This being so, it is not surprising that not all of the arguments advanced by the author will meet with general consent. It may be doubtful, e.g., whether the lack of consent by the Czechoslovak Parliament to the cession of the Sudetendeutsche Territory in September, 1938, made this cession invalid under Public International Law. It was so undoubtedly under Czechoslovak Constitutional Law, but the book is concerned with the problems of International Law only, and as for that, it is controversial whether an International Treaty, concluded by the Government, is binding if the consent of Parliament, necessary under the constitution of the country, has not been obtained. Dr. Taborsky is, of course, aware of this controversy, but he submits that one of the general principles of law, recognized by civilized nations and therefore a part of International Law, provides that Treaties, by which State territory is ceded, always require the approval of Parliament. This, with respect, seems to be too sweeping a statement. In Great Britain particularly Treaties for the cession of territory are considered to be binding without parliamentary sanction, although in practice such a sanction is generally obtained in case of an important cession of territory (Halsbury, Laws of England, 6th edition, Vol. 6, page 522). Be that as it may, the Munich Agreement, even if originally valid, has in the meantime been repudiated by Czechoslovakia as well as by the other United Nations on account of its breach by Germany in 1939, and there can be no doubt that the cession of Czechoslovak territory embodied therein has therefore ceased to be valid.

There are also some other problems with regard to which one may not share the author's opinion. E.g., the author criticizes that the Bank of England, on the request of the Bank of International Settlements, transferred to the deposit of the German Reichsbank gold which had been deposited with them by the Bank of International Settlements on behalf of the Czechoslovak National Bank. I am inclined to think that the Bank of England could not but comply with the orders of the Bank of International Settlements, and that only the former, not the Bank of England, is to be blamed.

But, in spite of such possible differences of opinion on minor questions, Dr. Taborsky is to be congratulated upon the production of a most valuable and fully documented survey of the problems of International Law arising out of the fall and resurrection of his country, a survey from which not only the science of Public International Law, but also the framers of the future Peace Treaty, when dealing with the particular problems of Czechoslovakia, will derive great assistance. The reader will share the hope,

expressed by Professor René Cassin in an eloquent preface, that Czechoslovak democracy, which, in prosperity as well as in trials, remained faithful to its ideals will soon be able to occupy again the place among the free nations which it won at such great cost. ERNST WOLFF

THE ELEMENTS OF THE LAW OF TORTS. By A. RAYMOND BLACKBURN, LL.B., and EDWARD F. GEORGE, LL.B., pp. xvi and 271. London: Sweet & Maxwell. 1944. **15s.**

In the Preface to this work the authors justify their production of yet another text-book on 'a well-worn theme' on the several grounds that other students' text-books have grown into practitioners' books and that recent changes of point of view in tort have rendered opportune 'a fresh approach.' Both grounds are adequate: but, although this book is unlikely to degenerate into a practitoners' work, one might beg leave to doubt the novelty of approach mentioned as its second justification. Not that this is necessarily a defect in a work which is addressed to the veriest beginners in law, since any approach will be novel to such readers. It is doubtful, however, whether most students do begin their study of law with tort, but, since the work is addressed to such as do, it might be suggested that too much space has been devoted in the first chapter to the distinction between tort and crime and too little to the history of the subject. The questions of the *generality* and of the *morality* of the basis of tortious liability could be more clearly severed and could follow upon an expanded historical outline (without the interposition of the present second treatment of the distinction between tort and crime). And, although the authors are at pains to distinguish inevitable accident from inevitable mistake, they do not mention Act of God until they come to nuisance and *Rylands* v. *Fletcher*; there is no attempt to relate inevitable accident and Act of God or to explain why the former does not include the latter (as logically it should).

This work satisfies the acid tests of a book for beginners: succinctness of statement and attractiveness of illustration. It is only occasionally that the authors lapse into such terms as *largely* piecemeal (p. 83) and the only misprints discovered by one reviewer were 'far' for 'for' (p. 80, para. 4, line 1) and 'plaintiff' for 'defendant' (p. 66, para. 2, line 2), although the meaning of the second sentence in para. 2 of p. 223 is by no means clear, and it is believed that beginners will not be much the wiser upon being told (on p. 196) that "the matter will be determined in accordance with the principles of international law." And, for the beginner, it might have been made clearer on p.44, where the common law rule in *Wood* v. *Leadbitter* is followed by *Hurst* v. *Picture Palaces*, that the latter overrides in effect the common law rule, so that the ejected licensee's remedy is rarely confined to damages for breach of contract. The statement (on p. 149) that the jury must be satisfied 'beyond reasonable doubt' in civil proceedings may well confuse a beginner. And, since pregnancy need not be proved in an action for loss of services, the word 'confinement' on p. 180 should be followed by 'or other illness.'

Succinctness of statement often necessarily convinces the beginner in cases where he might be better left in doubt. For instance, the *Polemis* rule is quoted without comment on its authority, though three members of the House of Lords recently remarked that that House had never accepted it. Public and private nuisance are said (on p. 63) to be "quite separate and distinct," although Professor Winfield has pointed out that

such a statement is perhaps too sharply expressed. The context in which *Bradford* v. *Pickles* is mentioned would lead a beginner to believe that Pickles acted out of 'pure spite,' although the House of Lords clearly stated that this was not so. In c.ix, the use of 'trespass' on p.122 and again on p. 124 may mislead a beginner, especially as the liability in question should on principle be case and not trespass, the retention of the word trespass being, as Professor Winfield has remarked, 'a stubborn archaism.' It might further be suggested that the chapter on 'Animals' should follow that on *Rylands* v. *Fletcher*, since cattle trespass might be regarded as a special instance of *Rylands* v. *Fletcher* liability. The chapter on negligence is clearly stated, but the beginner would probably benefit if the treatment of statutory negligence were left over until common law negligence had been dealt with, for the standard of care required by statute bears no necessary relation to the common law reasonable man. *Bourhill* v. *Young* is stated to be "a clear illustration of the rule" in *Donoghue* v. *Stevenson*; but the limits of the former appear to be as doubtful as those of the latter: if a reasonable man should foresee that noise may cause nervous shock, surely he should also foresee that noise goes 'all ways' and is (to all intents and purposes) unaffected by the presence of a tram between the place of its origin and the person hearing it; why then should he foresee only that persons in front will be affected?

The treatment (on p. 104) of the difficult problem of the duty of an occupier to an invitee injured by an 'open danger' may leave the student in some doubt. He is told that such an invitee may recover in the absence of acceptance of the risk and contributory negligence. On p. 107, Lord Wrenbury's words are cited that "a thing is . . . obvious if a reasonable person using reasonable care could have seen it." Taking these statements together, a student may legitimately wonder how such an invitee could recover: if the danger ought to be obvious to a reasonable man, he is presumably guilty of contributory negligence, if he did not see it; if, on the other hand, he is reasonable (and therefore by definition perceived the danger) and walked into it, he will presumably be met by the defence of acceptance of the risk. It is suggested that the rule should be clarified by explaining that the occupier has a defence only if what is 'open and obvious' to the reasonable man is (i) the thing which causes the injury, (ii) its defective condition, (iii) the consequent existence of danger and (iv) the full extent of this danger. It is submitted that the one case selected for discussion in the text—*Letang* v. *Ottawa &c., Railway*—is not illustrative of the general principles, in that the decision appears to depend upon the fact that contributory negligence was not relied on in the lower court; and the defence of acceptance of risk also failed, as the plaintiff's knowledge extended to (iii) above, but not to (iv)—i.e., the defect (which was apparent) could not reasonably be expected to give rise to the full extent of the danger (the full extent not being apparent). The general rule appears to be that the defendant will be successful, if the full extent of the danger is perceived (i.e., the nature and extent of the risk are comprehended) (*volenti non fit injuria*) or if they ought to have been (contributory negligence).

No two persons will agree upon the choice of cases for beginners, but the following might be suggested for the second edition: *Carr* v. *Fracis Times* (p. 29), *Markham* v. *Manchester Corporation* (p. 117), *Balden* v. *Shorter* (p. 159), *Pasley* v. *Freeman* (p. 165) (Lord Tenterden's Act) might also be mentioned in this chapter), *Beethan* v. *James* (p. 189) and

Century Insurance Co., v. *N.I.T.B.* (c. xix); while *Konskier* v. *Goodman* (p. 7) has been questioned, and *Hayward* v. *Drury Lane* is out of place on p. 227, as it has nothing to do with 'servants' or 'volunteers' and is not a case of common employment. And the beginner might be told that the defence of common employment is due to another rule based as little on 'justice' as is the defence itself, viz., that the employer is saddled with responsibility for his servants' torts, however improper the servants' actions in carrying out orders. There is no doubt that this book will prove immensely popular and useful to beginners. J. A. COUTTS

HARRIS AND WILSHERE'S CRIMINAL LAW. Seventeenth edition. By A. M. WILSHERE. London: Sweet & Maxwell, Ltd., 1943. xlvi and 700 pp. **21s.**

In the absence of any major reform in the field of criminal law and procedure since 1936, the year in which the last edition of this standard textbook appeared, the task of the editor could be performed without any considerable alterations. This afforded an opportunity to add to the usefulness of the book, especially for students, by providing references to the literature on criminal law—and it might have assisted in the exposition of topics, such as that of Master and Servant, on which a special section has been added to the new edition. *Sayre* in his article on "Criminal Responsibility for Acts of Another" in the *Harvard Law Review* (1930), Vol. 43, p. 689, has shown that it is wrong to explain the failure of criminal law to accept the doctrine of *respondeat superior* by the requirement of *mens rea*, just as the cases in which exceptionally vicarious criminal liability is admitted are not confined to absolute prohibitions. The growth of vicarious liability and the "eclipse of *mens rea*" are "parallel but disconnected results flowing from a common cause," the tendency to separate law and morality. The new section on Master and Servant begins by distinguishing between those offences in which *mens rea* is essential, where a master cannot be held liable for the acts of his servants, and absolute statutory prohibitions, where a master may be liable vicariously. The section is concluded by an account of *Allen* v. *Whitehead*, [1930] 1 K.B. 211, in which the defendant was held vicariously responsible for an offence requiring *mens rea*. A reference to *Sayre's* article might have helped to explain this contradiction. Similarly, a reference to the articles of Turner in the *Cambridge Law Journal* would have added to the value of the section dealing with manslaughter.

The chapter on the Courts of Criminal Jurisdiction has been transposed from the second half of the book, dealing with Criminal Procedure, to the first half so as to conclude the chapter on the General Part of Criminal Law. The list of the Criminal Courts now also includes the Courts of Summary Jurisdiction, although it does not mention the Juvenile Courts, for a discussion of which the reader must turn to the chapter at the end of the book where the constitution and jurisdiction of Courts of Summary Jurisdiction are explained.

The only other important structural change effected in the new edition is that instead of the table of the principal indictable offences there are now printed in Appendix B a few extracts of emergency legislation dealing with criminal law and its administration.

The task of noting new case-law has been performed conscientiously and skilfully, and the new edition will unquestionably maintain the established reputation of *Harris and Wilshere* as an accurate record of English criminal law and procedure. J. UNGER